

**WEST VIRGINIA  
SECRETARY OF STATE**

**KEN HECHLER**

**ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark in this Box

RECEIVED

1995 JUL 31 PM 3:37

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

Division of Environmental Protection  
AGENCY: Water Resources/Solid Waste Management TITLE NUMBER: 47

CITE AUTHORITY WV Code 22-17-6

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 36

TITLE OF RULE BEING AMENDED: Underground Storage Tanks

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

B7Jmil

Authorized Signature

10.20



BUREAU OF ENVIRONMENT  
10 McJunkin Road  
Nitro, WV 25143-2506

GASTON CAPERTON  
GOVERNOR

LAIDLEY ELI MCCOY, PH.D.  
COMMISSIONER

July 28, 1995

Ms. Judy Cooper  
Director, Administrative Law Division  
Secretary of State's Office  
Building 1, Suite 157K  
Charleston, West Virginia 25305

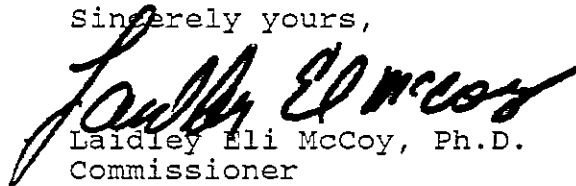
RE: 47CSR36 - "Underground Storage Tanks"

Dear Ms. Cooper:

This is to advise you that I am giving approval for the filing of the above-captioned agency-approved rule with the Secretary of State's Office and Legislative Rule-Making.

Your cooperation in this regard is very much appreciated. If you have any questions or require additional information, please feel free to contact Roger T. Hall at 759-0515.

Sincerely yours,

  
Laidley Eli McCoy, Ph.D.  
Commissioner

LEM;RTH:cc

Attachment

### STATEMENT OF CIRCUMSTANCES

The current certification regulations do not specifically address tank and piping tightness testers therefore there is no alternative for them to be allowed to perform the necessary minor repairs and to reconnect existing piping and/or equipment during testing other than to qualify for the more stringent Class A Installer certification class. When these testers pass the examination for Class A certification they are also being certified by the Division of Environmental Protection to install new underground storage tank systems. The majority of these testers have no experience in underground storage tank installation.

Certification by the Division of Environmental Protection of these inexperienced persons as underground storage tank installers is creating a serious threat to human health and safety and the environment. Improperly installed underground storage tank systems may result in explosive level vapors in homes and businesses and/or in the contamination of drinking water.

The creation of a Class C certification will provide a specific, limited and less stringent class of certification for the testers.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 47, Series 36, "Underground Storage Tanks"  
 Type of Rule: XX Legislative        Interpretive        Procedural  
 Agency: Bureau of Environment  
Division of Environmental Protection/  
 Address: Office of Waste Management  
1356 Hansford Street  
Charleston, WV 25301-1401

1. Effect of Proposed Rule

	ANNUAL			FISCAL YEAR	
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIR & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates: These regulations clarify and simplify existing regulations. No new administrative expenditures are anticipated.
3. Objectives of these rules: To clarify and simplify current regulations and to create a new certification class to allow tank tightness testers an alternative to qualifying for the entire certification Class A.

Rule Title: Title 47, Series 36, "Underground Storage Tanks"

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

No Impact.

B. Economic Impact on Political Subdivision; Specific Industries; Specific groups of Citizens.

The rule will not economically affect those already regulated and will provide a reduced regulation for some of them.

C. Economic Impact on Citizens/Public at Large.

No Impact.

Date:

6/22/95

Signature of Agency Head or Authorized Representative

Roger Hall  
Roger Hall



3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

---

---

b. Date of hearing? \_\_\_\_\_

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

---

d. Attach findings and determinations and reasons:

Attached \_\_\_\_\_

### SUMMARY OF THE PROPOSED RULE

This amendment will clarify and simplify the current requirements in the certification regulations. It will also provide a new class of certification to allow tank and line tightness testers to become certified to perform minor repairs and reconnect existing piping and equipment during testing without having to meet all the qualifications of the Class A certification.

TITLE 47  
LEGISLATIVE RULES  
DIVISION OF ENVIRONMENTAL PROTECTION  
WATER RESOURCES - WASTE MANAGEMENT

SERIES 36  
UNDERGROUND STORAGE TANKS

RECEIVED  
1995 JUL 31 PM 3:37  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

§47-36-1. General.

1.1. Scope and Purpose. --This legislative rule establishes regulations to govern the construction, installation, upgrading, use, maintenance, testing, and closure of underground storage tanks in this State.

1.2. Authority. --W. Va. Code §22-17-6

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Determination of Stringency. This rule is no more stringent than the federal counterpart regulation; however, the rule may be considered to be broader in scope.

1.6. Constitutional Takings Determination. No constitutional takings of real property are anticipated as a result of this rule.

§47-36-2. Adoption of Federal Regulations.

2.1. The director hereby adopts and incorporates by reference the provisions contained in 40 C.F.R. Part 280 as published in the Code of Federal Regulations on July 1, 1994 1995, with the following modifications:

2.1.1. The definition of "Implementing Agency" that appears in 40 C.F.R. §280.12 shall be deleted and replaced by "Implementing Agency means the West Virginia Division of Environmental Protection."

2.1.2. The provisions contained in 40 C.F.R. §280.20(e) shall be deleted and replaced by Section 3 of this rule.

2.1.3. The provisions contained in 40 C.F.R. §280.22 shall be deleted and replaced by Section 4 of this rule.

2.1.4. The phrase "section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended" that appears in 40 C.F.R. §280.34 shall be deleted and replaced by the phrase "W. Va. Code §22-17-13".

2.1.5. The provisions contained in 40 C.F.R. §280.34(a)(1) shall be deleted and replaced by "(1) Notification in accordance with the provisions of Section 4 of this rule".

2.1.6. The provisions contained in Appendices II and III of 40 C.F.R. Part 280 shall be deleted.

§47-36-3. Certification Requirements for Individuals Who Install, Repair, Retrofit, Upgrade, Perform Change-in-Service or , Close, or Tightness Test Underground Storage Tank Systems.

3.1. The requirements of this Section apply to individuals engaged in underground storage tank system installation, repair, retrofitting, upgrading, change-in-service, ~~or~~ closure, or tightness testing.

3.2. After December 31, 1994, no individual shall conduct an underground storage tank system installation, repair, retrofit, upgrade, change-in-service, or closure and after the effective date of these regulations no individual shall conduct a tightness test unless an individual present at the underground storage tank system site and exercising responsible supervisory control over the installation, repair, retrofit, upgrade, change-in-service, or closure, or tightness test is currently certified by the director in accordance with this Section. The underground storage tank system owner and operator must ensure that the individual supervising the installation, repair, retrofitting, upgrade, change-in-service, and/or closure, and/or tightness testing is certified by the director. The certified individual is equally responsible for ensuring that the underground storage tank system installation, repair, retrofit, upgrade, change-in-service, closure, and/or tightness testing is conducted in accordance with all applicable rules, regulations, and policies established by the director.

3.2.1. An individual who holds a current certificate issued by the director shall be present at all times during:

3.2.1.a. The installation process involving the preparation of the excavation immediately prior to receiving backfill and the tank, the setting of the tank and the piping (including placement of any anchoring devices), backfilling to the level of the tank, strapping, anytime during the installation in which piping components are connected, all testing of the underground storage tank and piping performed during the installation, completion of the backfill and filling of the excavation, and installation of release detection devices within the excavation zone;

3.2.1.b. The repair, retrofitting or upgrading process involving the excavation of existing tanks and/or piping, the actual performance of repairs to the tank and/or piping, anytime during the process when components of the piping are connected, anytime during the repair process when the tank and/or associated piping are tested and at anytime during the process when equipment is connected to the tank and/or piping; ~~and~~

3.2.1.c. The tightness testing of tanks and/or piping; and

~~3.2.1.c.~~ 3.2.1.d. The change-in-service or closure process involving the process of vapor removal, purging, inerting, cleaning and all subsurface sample collection events.

3.3. The underground storage tank system certificates issued by the director will address the following categories:

3.3.1. A Class A certificate will allow the individual certified to install, repair, retrofit or upgrade an underground storage tank system; ~~and~~

3.3.2. A Class B certificate will allow the individual certified to perform a change-in-service or close an underground storage tank system; and

3.3.3. A Class C certificate will allow the individual certified to perform tank and/or piping tightness testing and to perform minor repairs and to disconnect and reconnect piping and equipment to an underground storage tank system as is necessary to perform the tightness test.

3.4. An individual applying for a Class A ~~and/or~~, Class B ~~and/or~~ Class C certificate must file a written application on a form supplied by the director showing the director that he or she meets the following requirements:

3.4.1. The applicant must be an individual. Businesses or corporations may not be certified;

3.4.2. The applicant need not be a resident of West Virginia;

3.4.3. The applicant shall demonstrate ethical practice. The demonstration shall consist of providing to the director written statements from two (2) personal references and two (2) business references attesting to the applicant's ethical practices. In addition, the director may conduct a police check and checks with other certification or licensing boards with which the applicant is registered to determine the nature of violations of Federal, State or local laws and regulations relating to the applicant's performance in an ethical and competent manner. The director may deny the applicant's certification based upon the documentary evidence obtained pursuant to this subdivision;

3.4.4. The applicant must demonstrate ~~two (2) years of experience in active participation in a minimum of ten (10) regulated underground storage tank system installations, repairs, retrofitting retrofits, upgrading upgrades, performances of a change-in-service and , closures, and/or tightness testing conducted after December 22, 1988, as is applicable to the Class A and/or , B and/or C certificate.~~ Closely related work experience may be substituted ~~on a year for year basis~~ upon approval by the director. ~~The An applicant who is a Registered Professional Civil or Mechanical Engineer duly licensed by the State Board of Registration for Professional Engineers of West Virginia may substitute this license a civil or mechanical engineering degree from a recognized college or university for the required experience for Class A or Class B;~~

3.4.4.a. Applicants shall provide the director a listing of the work performed, site locations, and the names of the companies or employers for whom the work was performed;

3.4.4.b. Applicants for Class C certification must submit proof of a current certification by the manufacturer of each tank and/or piping tightness test method that they will be using and must assure by a signed written statement filed with the director that they will follow the current test protocol established by the manufacturer and policies established by the director;

3.4.5 No applicant shall be issued a certificate unless he or she has successfully passed a written examination administered by the director;

3.4.5.a. Examinations administered to applicants for certification shall be written, multiple choice examinations. The Director shall derive the questions used in the examination ~~from standards, instructions, industry recommended practices and State and Federal laws and regulations pertaining to underground storage tank system installation, repair, retrofitting, upgrading, change-in-service and , closure, and tightness testing.~~ The director can make available to applicants alternative testing procedures;

3.4.5.b. Beginning after July 1, 1994, the director or persons designated by the director shall conduct written examinations at such times and locations within the state as the director may consider necessary;

3.4.5.c. Applicants for certification must correctly answer not less than 80 percent of the questions in a category of certification to qualify for that category of certification; and

3.4.5.d. No applicant may take an examination more than three (3) times within a twelve (12) month period. Applications are considered current for a period of one (1) year from the date they are received by the director. After one (1) year, a new application must be filed and the examination fee paid; and

3.4.6. At the time of the examination the applicant shall remit a nonrefundable \$75 fee by check or money order. This fee shall be deposited in the Underground Storage Tank Administrative Fund. A fee of \$35 shall be assessed for each retesting within the same year.

3.5. All certificates and certificate renewals expire December 31 of every second year. Applications for certificate renewal and payment of a nonrefundable renewal fee of \$50 must be submitted to the director by November 1 of the year in which the certificate expires. An individual whose certificate has expired prior to his or her submission of an application for renewal is considered a new applicant for certification.

3.5.1. An individual may renew his or her certificate for another two (2) year period by:

3.5.1.a. Paying the renewal fee; and

3.5.1.b. Submitting on a form supplied by the director a certificate renewal application demonstrating that he or she has completed sixteen (16) hours of director approved continuing education training courses and has participated in at least one (1) job applicable to the class of certification within the certification period:

3.5.1.b.A. The ~~continued~~ continuing education training course must be relevant to the subject area of installation, repair, retrofitting, upgrading, change-in-service, closure, tightness testing or the regulation of underground storage tank systems as it relates to the category of certification and offer instruction on the most current generally acceptable technology or methods for these subjects; and

3.5.1.b.B. Applications for approval of specific training programs shall be submitted by the training provider to the director in writing. The submissions shall contain a complete course outline, training material, sample certificates, the methodology for verifying attendance, the date, time and location of the course, the name of the offering organization, the credentials of the instructors, and a certification that the technology or methods that will be presented in the training program will satisfy state and federal laws governing underground storage tank system installation, repair, retrofitting, upgrading, change-in-service, ~~or~~ closure, or tightness testing; or

3.5.1.c. Submitting on a form supplied by the director a certificate renewal application, demonstrating that he or she has participated in at least one (1) job applicable to the class of certification within the certification period and successfully passing the written examination described in Section 3.4.5. of this rule. At the time of the examination, the applicant applying for renewal must remit a nonrefundable \$50 fee by check or money order.

3.6. Upon issuance of the certification the director shall issue an identification card to the successful applicant that shows the individual's name, social security number, certificate issuance date, certificate expiration date, certification number and the class of certification.

3.6.1. An individual who holds a current certificate shall present his or her identification card upon request by a representative of the director or the owner or operator of the underground storage system for which an installation, repair, retrofit, upgrade, change-in-service ~~or~~ closure or tightness test is to be conducted.

3.7. Should an applicant be denied issuance or renewal of certification or should the individual's certificate be revoked, the reason or reasons for the denial or revocation shall be set forth in writing to the individual by the director.

3.7.1. Possible reasons for denial of issuance of certification, renewal of certification or revocation of certification may include, but are not limited to, failure to achieve a passing score on the written examination described in Section 3.4.5. of this rule, failure to submit required documentation, failure to follow the tank and/or piping tightness testing manufacturer's protocol and/or policies established by the director, previous revocation of certification held by the applicant, evidence of fraud or deceit with respect to the certification application, failure to present the identification card upon request of a director's representative, violations of the laws or rules of West Virginia, for ethical considerations enumerated in Section 3.4.3. of this rule, and/or any other cause that, in the opinion of the director, constitutes adequate grounds for denial or revocation of a certificate.

3.7.2. An individual who has been denied issuance or renewal of certification or who has had a certificate to be revoked may appeal the action to the Environmental Quality Board pursuant to the provisions of WV Code §22-17-18.

3.8. Any individual who violates the provision of Section 3 of this rule is subject to enforcement action under WV Code §22-17-1 et seq.

#### §47-36-4. Notification Requirements.

4.1. Except as provided in Section 4.1.1, 4.1.2, or 4.1.3 of this rule, the owner or operator of an underground storage tank system that was in the ground prior to May 1, 1990, must submit a notice of the existence of such tank system to the director by completing the form prescribed in Appendix I of this rule.

4.1.1. The owner or operator of an underground storage tank system that was in the ground prior to May 1, 1990, is exempt from the notification requirements of Section 4.1 of this rule if notice was previously given to the director in accordance with the provisions of the federal Hazardous and Solid Waste Amendments of 1984 on the form published in the Federal Register on November 8, 1985 (50 F.R. 46602), unless such notice was given pursuant to Section 103(c) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

4.1.2. The owner or operator of an underground storage tank system that was removed from the ground on or before May 8, 1986, is exempt from the notification requirements of Section 4.1 of this rule.

4.1.3. The owner or operator of an underground storage tank that was installed before December 22, 1988, need only complete Sections I through X of the form prescribed in Appendix I of these regulations. Tank systems installed on or after December 22, 1988, must comply with the provisions of Section 4.2 of this rule.

4.2. All owners and operators of underground storage tank systems installed on or after December 22, 1988, must provide the director, in addition to the provisions of Section 4.1.3 of this rule, notification of compliance with the following requirements:

4.2.1. For underground storage tank systems installed on or after December 22, 1988, and before January 1, 1995, installation of tanks and piping as certified under Section XI of the form prescribed in Appendix I of these regulations, excluding Item B (Installer certified or licensed by the implementing agency) under Section 1 (Installation) of Part XI (Certification of Compliance).

4.2.2. For underground storage tank systems installed on or after January 1, 1995, installation of tanks and piping by an individual certified by the director in accordance with Section 3 of these regulations.

4.2.3. Cathodic protection of steel tanks and piping in accordance with the provisions of 40 C.F.R. §§280.20(a) and 280.20(b).

4.2.4. Spill and overflow prevention equipment in accordance with the provisions of 40 C.F.R. §280.20(c).

4.2.5. Financial responsibility in accordance with the provisions of 40 C.F.R. Part 280 Subpart H.

4.2.6. Release detection in accordance with the provisions of 40 C.F.R. §§280.41 and 280.42.

4.3. All owners and operators of underground storage tank systems to be installed on or after ~~the effective date of this rule~~ June 14, 1993, must notify the director in writing at least thirty (30) days prior to beginning the installation. The thirty (30) day time period may be waived when such action is in response to a release from an existing UST system on the site.

4.4. All owners and operators of UST systems must ensure that:

4.4.1. When the system was installed on or after December 22, 1988, and before January 1, 1995, the installer certifies, in the notification form, that the methods used to install the tanks and piping comply with the requirements of 40 C.F.R. §280.20(d); and

4.4.2. When the system was installed on or after January 1, 1995, the installation of tanks and piping was performed by an individual certified by the director in accordance with Section 3 of these regulations. The installer must certify in the notification form that the methods used to install the tanks and piping comply with the requirements of 40 C.F.R. 280.20(a) through (d).

4.5. An owner or operator who is required to submit notices under Section 4 of these regulations may provide notice for several tanks by using one notification form, but an owner of tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

4.6. After June 10, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of the tank of the owner's notification obligations under Section 4 of these regulations. The following notice may be used to comply with the requirement:

"NOTICE: Owners of certain underground storage tanks in West Virginia are required by law to notify the director of the Division of Environmental Protection of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986, must be made within thirty (30) days. Consult the Division's Underground Storage Tank Rule (47 C.S.R. 36) to determine if you must provide this notification."

4.6.1. After June 14, 1993, any Any person who sells an existing tank intended to be used as an underground storage tank must notify the director in writing at least thirty (30) days prior to the transfer of ownership.

4.7. Except as provided in Section 4.6.1 of these regulations, the owner or operator must report changes in the status of any underground storage tank system by completing the form prescribed in Appendix I of these regulations and then submitting that form to the director by December 31 of the year in which the change of status occurred.

4.7.1. A new owner of an underground storage tank must provide notification of the transfer of ownership of that tank by completing the form prescribed in Appendix I of these regulations along with proof of financial responsibility in accordance with the provisions of 40 C.F.R. Part 280 Subpart H and then must submitting that form this information to the director within thirty (30) days of the transfer.

#### §47-36-5. Carriers.

5.1. Carriers (private, common, or for-hire) of regulated substances shall not deliver regulated substances into an underground storage tank unless the division has certified that the underground storage tank owner or operator is in compliance with the requirements of: the Underground Storage Tank Fee Assessments (47 C.S.R. 37), Notification Requirements (47 C.S.R. 36 Section 4); and Capitalization Fee Requirements (47 C.S.R. 37A Section 5) and the owner or operator presents proof of this certification along with proof of financial responsibility in compliance with 40 C.F.R. Part 280 Subpart H to the carrier.

5.2. Any carrier who violates the provision of Section 5.1 of these regulations is subject to enforcement action under WV Code §22-17-1 et seq.

<b>Notification for Underground Storage Tanks</b>	<b>STATE USE ONLY</b>
<small>State Agency Name and Address</small> WV Div. of Environmental Protection, Office of Waste Mgmt., UST Section 1356 Hanford Street, Charleston, WV 25301	<b>ID NUMBER</b>
<b>TYPE OF NOTIFICATION</b>	<b>F.E.I.N.: No.</b>
<input type="checkbox"/> <b>A. NEW FACILITY</b> <input type="checkbox"/> <b>B. AMENDED</b> <input type="checkbox"/> <b>C. CLOSURE</b> _____ No. of tanks at facility      _____ No. of continuation sheets attached	A. Date Entered Into Computer _____ B. Data Entry Clerk Initials _____ C. Owner Was Contacted to Clarify Responses. Comments _____ _____ _____ _____
<b>INSTRUCTIONS</b>	
<p>Please type or print in ink all items except "signature" in section VIII. This form must be completed for each location containing underground storage tanks. If more than five (5) tanks are owned at this location, photocopy the following sheets, and staple continuation sheets to the form.</p>	

**GENERAL INFORMATION**

Notification is required by Federal law for all underground tanks that have been used to store regulated substances that are in the ground as of May 8, 1986, or that are brought into use after May 8, 1986. The information requested is required by Section 9002 of the Resource Conservation and Recovery Act, (RCRA), as amended.

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum or hazardous substances. It is expected that the information you provide will be based on reasonably available records, or in the absence of such records, your knowledge, belief, or recollection.

**Who Must Notify?** Section 9002 of RCRA, as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means—

a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances; and

b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use.

c) if the State agency so requires, any facility that has undergone any changes to facility information or tank system status (only amended tank information needs to be included).

**What Tanks Are Included?** Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of regulated substances; and (2) whose volume (including connected underground piping) is 10% or more beneath the ground. Some examples are underground tanks storing: 1. Gasoline, used oil, or diesel fuel; and 2. industrial solvents, pesticides, herbicides or fumigants.

**What Tanks Are Excluded?** Tanks removed from the ground are not subject to notification. Other tanks excluded from notification are:

1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. tanks used for storing heating oil for consumptive use on the premises where stored;

3. septic tanks;
4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws;
5. surface impoundments, pits, ponds, or lagoons;
6. storm water or waste water collection systems;
7. flow-through process tanks;
8. liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;
9. storage tanks situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

**What Substances Are Covered?** Tank notification requirements apply to underground storage tanks that contain regulated substances. This includes any substance defined as hazardous in section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subcode C of RCRA. It also includes petroleum, e.g., crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

**Where To Notify?** Send completed forms to:

WV Division of Environmental Protection  
Office of Waste Management  
UST Section  
1356 Hanford Street  
Charleston, WV 25301

**When To Notify?** 1. Owners of underground storage tanks in use or that have been taken out of operation, but still in the ground, must notify by May 8, 1986. 2. Owners who bring underground storage tanks into use after May 8, 1986, must notify within 30 days of bringing the tanks into use. 3. If the State requires notification of any amendments to facility send information to State agency immediately.

**Penalties:** Any owner who knowingly fails to notify or submit false information shall be subject to a civil penalty not to exceed \$10,000 for each tank for which notification is not given or for which false information is submitted.

**I. OWNERSHIP OF TANK(S)**

**II. LOCATION OF TANK(S)**

Owner Name (Corporation, Individual, Public Agency, or Other Entity)

Street Address

City State ZIP Code

County

Phone Number (include Area Code)

If required by State give the geographic location of tanks by degrees, minutes, and seconds. Examples Lat. 42, 36, 12 N Long. 85, 24, 17W

Latitude \_\_\_\_\_ Longitude \_\_\_\_\_

(if same as Section I, mark box here  )

Facility Name or Company See Identifier, as applicable

Street Address (P.O. Box not acceptable)

City State Zip code

County Municipality

III. TYPE OF OWNER	IV. INDIAN LANDS	
<input type="checkbox"/> Federal Government <input type="checkbox"/> Commercial <input type="checkbox"/> State Government <input type="checkbox"/> Private <input type="checkbox"/> Local Government	Tanks are located on land within an Indian Reservation or on other trust lands. <input type="checkbox"/>  Tanks are owned by native American nation, tribe, or individual. <input type="checkbox"/>	Tribe or Nation: _____ _____

V. TYPE OF FACILITY		
Select the Appropriate Facility Description		
<input type="checkbox"/> Gas Station <input type="checkbox"/> Petroleum Distributor <input type="checkbox"/> Air Taxi (Airline) <input type="checkbox"/> Aircraft Owner <input type="checkbox"/> Auto Dealership	<input type="checkbox"/> Railroad <input type="checkbox"/> Federal - Non-Military <input type="checkbox"/> Federal - Military <input type="checkbox"/> Industrial <input type="checkbox"/> Contractor	<input type="checkbox"/> Trucking/Transport <input type="checkbox"/> Utilities <input type="checkbox"/> Residential <input type="checkbox"/> Farm <input type="checkbox"/> Other (Explain) _____

VI. CONTACT PERSON IN CHARGE OF TANKS			
Name	Job Title	Address	Phone Number (Include Area Code)

VII. FINANCIAL RESPONSIBILITY	
I have met the financial responsibility requirements in accordance with 40 CFR Subpart H	
Check All that Apply <input type="checkbox"/> Self Insurance <input type="checkbox"/> Commercial Insurance <input type="checkbox"/> Risk Retention Group	<input type="checkbox"/> Guarantee <input type="checkbox"/> Surety Bond <input type="checkbox"/> Letter of Credit  <input type="checkbox"/> State Funds <input type="checkbox"/> Trust Fund <input type="checkbox"/> Other Method Allowed Specify _____

VIII. CERTIFICATION (Read and sign after completing all sections)		
I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.		

Name and official title of owner or owner's authorized representative (Print)	Signature	Date Signed

EPA estimates public reporting burden for this form to average 30 minutes per response including time for reviewing instructions, gathering and maintaining the data needed and completing and reviewing the form. Send comments regarding this burden estimate to Chief, Information Policy Branch PM-223, U.S. Environmental Protection Agency, 401 M Street, Washington D.C. 20460, marked "Attention Desk Officer for EPA." This form amends the previous notification form as printed in 40 CFR Part 280, Appendix I. Previous editions of this notification form may be used while supplies last.

**IX. DESCRIPTION OF UNDERGROUND STORAGE TANKS (Complete for each tank at this location.)**

Tank Identification Number	Tank No. _____	Tank No. _____	Tank No. _____	Tank No. _____	Tank No. _____	
<b>1. Status of Tank</b> (mark only one)	Currently in Use	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Temporarily Out of Use <small>(Remember to fill out section X.)</small>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Permanently Out of Use <small>(Remember to fill out section X.)</small>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Amendment of Information	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>2. Date of Installation (mo./year)</b>						
<b>3. Estimated Total Capacity (gallons)</b>						
<b>4. Material of Construction</b> (Mark all that apply)	Asphalt Coated or Bare Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Cathodically Protected Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Epoxy Coated Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Composite (Steel with Fiberglass)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Fiberglass Reinforced Plastic	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Lined Interior	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Double Walled	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Polyethylene Tank Jacket	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Concrete	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Excavation Liner	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Unknown	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Other, Please specify	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Has tank been repaired?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>5. Piping (Material)</b> (Mark all that apply)	Bare Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Galvanized Steel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Fiberglass Reinforced Plastic	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Copper	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Cathodically Protected	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Double Walled	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Secondary Containment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Unknown	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Other, Please specify	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b>6. Piping (Type)</b> (Mark all that apply)	Suction: no valve at tank	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Suction: valve at tank	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Pressure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Gravity Feed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Has piping been repaired?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Tank Identification Number	Tank No. _____	Tank No. _____	Tank No. _____	Tank No. _____	Tank No. _____
<b>7. Substance Currently or Last Stored In Greatest Quantity by Volume</b> Gasoline Diesel Gasohol Kerosene Heating Oil Used Oil Other, Please specify	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Hazardous Substance CERCLA name and/or, CAS number	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Mixture of Substances Please specify	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>X. TANKS OUT OF USE, OR CHANGE IN SERVICE</b>					
<b>1. Closing of Tank</b> A. Estimated date last used (mo./day/year)	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
B. Estimate date tank closed (mo./day/year)	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
C. Tank was removed from ground D. Tank was closed in ground E. Tank filled with inert material Describe	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
F. Change in service	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>2. Site Assessment Completed</b>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Evidence of a leak detected</b>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>



TRANSCRIPT OF PUBLIC HEARING

July 24, 1995

7:00 pm

CSR SITE: Title 47 Series 36 Section 3 and 4

AUTHORITY: W.Va. Code, §22-17-6

SCOPE: The amendment to the rule will effect persons certified by the division to perform work on underground storage tanks and persons who perform tank and line tightness tests on these tanks. The purpose of the amendment is to clarify and simplify some of the existing requirements for certification. The amendment will provide a new certification class so that tank tightness testers will not be required to take the complete examination for Class A in order to make minor repairs and/or reconnect existing piping and equipment when testing.

JUSTIFICATION: The amendment will clarify current requirements for certification and will provide tank tightness testers with a simplified certification alternative.

CSR CITE: Title 47 Series 36 Section 3 and 4

FEDERAL CITE: There is no comparable federal counterpart.

In attendance:

Gil W. Sattler, WV Division of Environmental Protection  
Bryan Farkas, WV Division of Environmental Protection  
Bob Foster, WV Manufacturers Association

There were no oral comments.

## RESPONSE TO COMMENTS

Comments submitted by Appalachian Power Company and  
The West Virginia Manufacturers Association:

The commenters have agreed with the addition of a Class C certification for tank and piping testers. The commenters take exception to the other amendments which they state were not included in the "Statement of Circumstances". The changes included in Section 3 of the regulations are as stated in the "Summary of the Proposed Rule" intended to simplify and clarify the certification requirements. Specifically:

- §3.4.4 - The two (2) year experience requirement has been difficult to evaluate in a fair manner for all applicants. There have been situations where an applicant may have performed twenty (20) UST related jobs in a twelve month (one year period). This would only qualify as one (1) year of experience toward certification. A second applicant may have performed four (4) jobs in a 24 month (two year) period. This would qualify the second applicant for certification. This is clearly unfair. Amending the regulations to require a set number of jobs to meet the required experience is more fair to the applicants. The second change in this section is to address the concern that persons who have civil or mechanical engineering degrees and but are not Registered Professional Engineers are not held to the high level of ethical conduct as the Registered Engineer. This is a concern because the experience requirement is waived for those persons in Class A and B. This waiver is not included in the Class C category because tank and piping tightness testing methods are patented systems and are either owned and operated by the testing company or sold as a franchise. The general public does not have ready access to this equipment and therefore it requires someone trained by the company in the proper procedures on how to use their specialized system. Neither of these changes will effect someone who does day to day maintenance on a UST system. The creation of a Class C does not add a certification requirement for any general maintenance. It adds only tightness testing to the current regulations. Certification for persons who perform repairs to the tank and/or piping is already required under Class A.

§3.5.1.b and 3.5.1.c. - This requirement will ensure that the persons certified by the DEP will continue to stay abreast of the current technology available. The current regulations allow a person to become certified and then retest every two (2) years to retain their certification. A person choosing this alternative could remain certified indefinitely without ever participating in UST related work. This was not the intent of the certification requirements. This requirement should not be cumbersome to a company because there are some routine maintenance requirements on all USTs that could be applicable to the recertification requirements.

§4.3 and 4.6.1 - These are not amendments to the current regulations but merely an updating to the regulations to incorporate the dates when these amendments became effective through past legislative passage.

§4.7.1 - This amendment is not intended to double the Director's enforcement power but to provide for this important information to be automatically filed with the DEP rather than requiring that a separate request letter be sent to the new UST owner. This requirement will also aid in insuring that the new owner has obtained financial responsibility for the newly purchased or installed USTs so that there will be no lapse in coverage in the event of a release.

These regulations have also been filed as a Proposed Rule with the West Virginia Secretary of State and as of this date have not been authorized as an Emergency Rule. The Public Hearing and Comment Period were therefore held prior to any action by the Secretary of State on approving the Emergency Rule. The Proposed Rule has been filed with the Secretary of State and the Legislative Rule-Making Review Committee for approval and submission to the 1996 Legislature.

Appalachian Power Company  
PO Box 2021  
Roanoke, VA 24022-2121  
703 985 2300

RECEIVED

JUL 25 1995

OFFICE OF WASTE MANAGEMENT  
UST SECTION  
CHARLESTON, WV 25301-1401



OVERNIGHT

Ms. Gil Sattler  
West Virginia Division of Environmental Protection  
Office of Waste Management  
UST Section  
1356 Hansford Street  
Charleston, West Virginia 25301-1401

Re: Comments of American Electric Power and  
Affiliated Power Companies  
Emergency Rules 47 CSR 36 - Underground Storage Tanks

July 24, 1995

Dear Ms. Sattler:

On behalf of American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power/Ohio Power Companies and Wheeling Power Company, I offer the attached comments on the West Virginia Division of Environmental Protection's proposed Emergency Rules for 47 CSR 36 - Underground Storage Tanks. I would like to offer our appreciation for the opportunity to submit these comments and I look forward to a continued good relationship between our companies and the DEP.

If you have any questions concerning our comments, please contact Mr. E. Ray Wirt of my staff at (540) 985-2376.

Sincerely,

A handwritten signature in cursive script that reads 'Robert J. Robinson' followed by a stylized flourish.

Robert J. Robinson  
Environmental Affairs Director

RJR:d  
Attachment

**Comments of American Electric Power on  
the Proposed Emergency Regulations  
for "Underground Storage Tanks"  
47 CSR 36**

**Introduction**

The American Electric Power family of Companies (which include the American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power/Ohio Power Companies and Wheeling Power Company) present the following comments to the proposed Emergency Regulations for Underground Storage Tanks (47 C.S.R. 36) of the West Virginia Division of Environmental Protection.

**General Comments**

The Company has reviewed the proposed emergency regulations and agrees with the West Virginia Division of Environmental Protection (the Division) that the establishment of a Class C certification requirement for tank tightness testers is appropriate. The Company believes that it is desirable that qualified personnel install, repair or upgrade underground storage tanks and piping systems. The establishment of the proposed Class C certification will ensure that non-qualified persons do not install tanks or piping systems, but still allows properly trained persons to conduct tank tightness testing and minor repairs associated with the tank tightness testing process.

The Company submits, however, that there were changes proposed to other parts of these emergency regulations that do not have any relevance with the establishment, and maintenance, of a Class C certification program. The Company takes exception to these "other" proposed modifications for two reasons: 1) they are outside of the scope of the proposed emergency regulations as defined in the "Statement of Circumstances" submitted to the Secretary of State's Office, and 2) the proposed modifications do not enhance the regulations in any way which would lead to a significant reduction of any threat to human health or the environment. These sections are:

- §3.4.4.
- §3.5.1.b
- §3.5.1.c.
- §4.3.
- §4.6.1.
- §4.7.1.

Based on the reasons cited above, the Company requests that no modifications to these sections be considered at this time.

## Specific Comments

However, should the WVDEP continue to pursue modifications to these sections, the Company submits the following comments:

### **§3.4.4.**

This section of the proposed Regulations has been extensively modified to require much more stringent requirements to obtain any level of certification from the Division. These proposed requirements are so stringent that it may not be possible for an industry to have an otherwise qualified employee certified "in-house" to complete occasional UST projects.

There are two major changes within this section of the proposed regulations. The first major proposed change eliminates the two-year experience requirement and replaces it with a new requirement which mandates that the candidate must have participated in a minimum of 10 regulated UST projects (specific to the type of certification). The second major proposed change disallows a candidate holding a mechanical or civil engineering degree from a recognized college or university from substituting this degree for the required experience for a Class A or Class B certificate application. Instead, the proposed change allows only a West Virginia licensed Professional Engineer (mechanical or civil engineers only) to use this option.

To address the first major change to this section, the Company believes that the Regulation, as it currently exists, is more appropriate than the proposed change. As written, the Regulations require two years experience in UST installations, repairs, and etc., to obtain certification from the Division. The existing language in the Regulation allows the Division to evaluate applicants based upon their overall experience with the UST Program as a whole. If the proposed change is approved, the Division is then eliminating their ability to evaluate applicants based on their competence, and is instead evaluating them solely on their "active participation" in UST projects (the phrase "active participation" is vague, and could mean any level of participation).

To address the second major change to this section, the Company recommends to the Division that the Regulations be modified to accept the professional license or certification of an engineer (mechanical or civil) or geologist from any other state, as long as the certifying state has a licensing or certification program equal to, or more stringent, than that of West Virginia, for purposes of qualifying for this experience substitution.

### **§3.5.1.b. and §3.5.1.c.**

Both of these sections add an additional requirement for applicants applying for a Class certification renewal. Specifically, the proposed regulations add a requirement to both of these sections which requires an applicant to have participated "in at least one (1) job applicable to the class of certification within the certification period."

The Company believes that this proposed additional requirement is too restrictive. There may be times where a competent individual may not need to complete an UST project for their company within any given two year certification period. However, that same individual may be responsible for handling emergency UST repairs (should they be necessary), rerouting underground piping, and other related work for their company. In many cases, it is more cost effective for a company to do this type of work themselves since they have the equipment and expertise available to do it. By adding this requirement, competent persons may lose their certification(s), which in turn will increase operating costs for their respective companies. The proposed modifications to these sections of the Regulation should not be implemented.

#### §4.7.1.

This section has been amended to require new owners of transferred underground storage tanks to submit proof of financial responsibility in addition to filing the appropriate UST notification form to the WVDEP. Federal Regulation 40 CFR Part 280.110(c), already gives the director of the Implementing Agency (in this case the WVDEP) the authority to require an owner/operator to submit to the director evidence of financial assurance or any other information relevant to the compliance of 40 CFR 280, Subpart H. The Company requests that this proposed modification be eliminated from consideration because this requirement could lead to a person being held to be in noncompliance with two separate parts of the regulations for the same act. A violation of the regulations provides sufficient opportunity for the Division to seek redress without the need to double the Director's enforcement power by making the violation of one section of the regulations an automatic violation of a second section.

LAW OFFICES  
**ROBINSON & McELWEE**

CLARKSBURG OFFICE  
P.O. BOX 128  
CLARKSBURG, WEST VIRGINIA 26302  
TELEPHONE (304) 622-5022  
TELEFAX (304) 622-5065

P.O. BOX 1791  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE (304) 344-5800  
TELEFAX (304) 344-9566

600 UNITED CENTER  
500 VIRGINIA STREET, EAST  
CHARLESTON, WEST VIRGINIA 25301

KARYN M. SCHMIDT  
DIRECT DIAL NO. (304) 347-8329

**RECEIVED**

JUL 25 1995

LEXINGTON OFFICE  
P.O. BOX 1560  
LEXINGTON, KENTUCKY 40592  
TELEPHONE (606) 231-8131  
TELEFAX (606) 255-1168

OFFICE OF WASTE MANAGEMENT,  
UST SECTION  
CHARLESTON, WV 25301-1401

July 25, 1995

VIA HAND DELIVERY

Division of Environmental Protection  
Office of Waste Management  
1356 Hansford Street  
Charleston, West Virginia 25301

Re: Emergency Rule Changes to  
Underground Storage Tanks Regulation

Dear Sir or Madam:

Enclosed are the original and two (2) copies of the comments of the West Virginia Manufacturers Association (WVMA) to the West Virginia Division of Environmental Protection, Office of Waste Management on the emergency rule changes to the Underground Storage Tanks regulation, 47 CSR 36. The WVMA files these written comments in accordance with the Notice of Public Hearing requiring written comments to be filed by 5:00 pm July 25, 1995.

We respectfully request that you please stamp one copy as "Received" and return to us. The WVMA appreciates the opportunity to comment on this emergency rule, and should you have any questions, please contact me at your earliest convenience.

Very truly yours,

  
Karyn M. Schmidt

KMS:nls

Enclosure

c: Karen S. Price, WVMA  
Robert L. Foster, WVMA

WV - DEP  
WASTE MANAGEMENT

JUL 25 3 18 PM '95

**RECEIVED**

**COMMENTS OF THE  
WEST VIRGINIA MANUFACTURERS ASSOCIATION  
ON EMERGENCY RULE CHANGES TO  
UNDERGROUND STORAGE TANK REGULATION  
47 CSR 36**

July 19, 1995

**I. INTRODUCTION**

On June 22, 1995, Director Eli McCoy of the Division of Environmental Protection ("DEP") gave approval for the filing of 47 CSR 36 as an emergency rule with the Secretary of State's office. The Notice of Emergency Rule was filed with the West Virginia Secretary of State on June 23, 1995. The Notice provides that a public hearing will be held on the proposed rule on July 24, 1995 at 7:00 pm and that written comments will be accepted by DEP until 5:00 p.m. July 25, 1995.

The primary purpose of the Emergency Rule appears to be to create a Class C for limited underground storage tank ("UST") repair and maintenance activities. DEP makes this in response to an overbroad Class A, which allowed persons with little experience to qualify for more complex UST installation and upgrade activities. The proposed Class C appears to be designed to be the certification level for tank and piping tightness testing.

Because the agency action is an emergency rule, the agency must demonstrate some immediate need for the regulatory change. In its memorandum to the Legislative Rule-Making Review Committee, the Division of Environmental Protection cites as the facts and circumstances making the emergency rule necessary for immediate "preservation of public peace, health, safety or welfare," the following:

The certification section of the regulations requires anyone who repairs or attaches equipment to the tank or piping to be certified in Class A. Class A also allows those certified persons to install new tank and piping systems. As tank tightness testers do make minor repairs and reconnect existing piping and equipment while performing the test they are required to be certified in Class A. A majority of these people have never installed tanks or piping. If they pass the Class A examination the Division will be certifying them to perform an installation for which they have no experience. If they should perform an installation without prior experience, human health and safety and the environment may be compromised.

The West Virginia Manufacturers Association ("WVMA") recognizes that, as stated by the DEP, the current certification regulations may in fact in some circumstances allow an "unqualified" person to be certified to install underground storage tank systems. We believe, however, that the proposed changes to the regulation sweep far beyond the stated purposes for the emergency rule, and for this reason submit these comments on the emergency rule.

The WVMA is an organization comprised of a large number of business, manufacturing, and other interests of all sizes located throughout West Virginia. WVMA members are subject to and greatly affected by environmental regulations such as the one now proposed by the DEP, and have been interested and involved in legislative and regulatory effort that affect the WVMA community for years. Many WVMA members store petroleum on-site in regulated USTs, so this rule has broad application to many of our members. The WVMA seeks to ensure the development of a reasonable and consistent regulatory program, and accordingly, submits these comments.

## II. GENERAL COMMENTS

### A. Emergency Rule is Overbroad

The DEP's motivation in proposing this emergency rule seems to be that the certification issued by the State needs to reflect the actual expertise required to conduct a particular UST repair or other service. The WVMA recognizes that this approach is consistent with practice in the field, and we have no objection to this approach. The level of expertise required to install a tank, for example, greatly exceeds that required to make a minor repair to the tank or piping system, and it is entirely appropriate that several different certification classes exist tailored to the complexity of the task at hand. The WVMA has great difficulty, however, with regulations that require far more expertise than is necessary for underlying basic maintenance activities at UST facilities.

A great many WVMA members have at least one petroleum UST located at their facilities. Businesses that need to service fleets often have more than one tank. The DEP's rule demands that virtually any day-to-day maintenance conducted on these systems be conducted by a Class C certified individual. While we do not object to the concept that a Class C certification may be necessary for this type of day-to-day maintenance, if the DEP chooses to extend its regulations to this type of day-to-day maintenance, Class C certification should be relatively easy to obtain by persons who ordinarily service tanks and piping on a day-to-day basis at the facility. It is unreasonable for DEP to require a facility to hire off-site consultants who may be much less familiar with the facility's tanks and piping to conduct this work. DEP

should provide for a Class C certification that allows the facility to use its on-site personnel who are most familiar with the system.

We note that for many facilities, there is a need to have available personnel who can conduct minor repairs and adjustments to piping. There is no real need, from a practical standpoint, to have such persons specially certified under the UST program to do so; as noted throughout these comments, such persons are often highly experienced with regard to piping systems and hazardous substances.

**B. No Demonstration of Immediacy**

The Director of the DEP has authority to issue emergency rules when necessary to protect human health and the environment. To do so, however, there must be some immediate need to promulgate the emergency rule, because in doing so the Director is bypassing the notice and comment process and essentially issuing a rule by fiat, subject only to later challenge. In the meantime, facilities must comply with the emergency rule, and are subject to penalties for non-compliance. The regulated community did not have the opportunity to consider or point out problems with the regulation prior to its issuance.

For these reasons, emergency rules should be held accountable strictly for procedural errors in issuance, and should be reviewed carefully by the issuing agency. Here, we believe the DEP has not demonstrated that there is any immediate need for an emergency rule. There is no demonstration that persons currently certified as Class A are installing tank systems with inadequate experience, or doing so in a way that endangers human health and the environment. "Quick fixes" are often the most

problematic, especially from an administrative agency, and here we have just such a "quick fix" that is unjustified. We urge DEP to withdraw the emergency rule and promulgate the change to the Underground Storage Tank Regulation as a legislative rule.

**C. Emergency Rule Does Not Grant Authority to Make Collateral Changes**

Because the agency has issued an emergency rule, it is limited to the purpose of the rule (and the immediate "emergency") in making its regulatory changes. Anything outside this purpose -- the creation of a Class C certification -- must be promulgated as a legislative rule in ordinary notice and comment rulemaking. For this reason, we urge DEP to withdraw this emergency rule and reissue it with an opportunity for notice and comment before it becomes effective.

When DEP issues a rule that exceeds its emergency authority and makes collateral changes to the regulatory program, as here, the WVMA objects to the improper issuance of the rule. Although we also submit comments here on the substance of some of those "collateral" changes that exceed the agency's authority, we do not intend to suggest that those changes are appropriate: our comments should be construed as an objection both as to the improper manner of rule issuance and the subject matter commented upon.

**III. SPECIFIC COMMENTS**

**A. Section 3.3.3**

This section adds the new Class C certification level. It appears that this section is designed to cover tightness testing and associated minor repairs,

connections, and reconnections to piping and equipment. We ask that DEP clarify that all activities not covered by this regulation do not require certification. It would be helpful to the regulated community for DEP to clarify that day-to-day maintenance and repair to tank systems does not require certification unless the activity falls within the description for Classes A, B, or C.

**B. Section 3.4.4**

**1. Participation in Ten UST Activities**

This section provides that all individuals applying for a Classes A, B, or C certificate must meet certain requirements. Specifically, the applicant must demonstrate "active participation in a minimum of ten regulated underground storage tank installations, systems repairs, retrofits, upgrades, performances of a change in service, closures and/or tightness testing conducted after December 22, 1988." As this section is drafted, an applicant for a Class A certification who would be certified to install USTs has met the experience requirement if he or she has actively participated in ten tightness testing procedures conducted in the past eight years. The applicant for the Class C certification is held to the same standard.

As an initial matter, we note that DEP has no authority to make this change for Class A and Class B certifications in this emergency rule. If DEP wishes to change the experience requirement for these certifications, it must do so in a legislative rule with adequate opportunity for public comment before the rule becomes effective. We strongly urge DEP to withdraw the emergency rule or those portions of the emergency rule that do not address the Class C certification issue.

On a substantive level, there is no justification for demanding this equivalence of experience. The Class C certification is for tightness testing, not installations, retrofitting, or more complex tasks. Class C activities do not require Class A experience; this is the essence of the regulatory change made here.

In fashioning this regulation, DEP should keep in mind that it applies to more than just specialized UST contract companies; for example, it applies also to engineers and other personnel who routinely conduct basic tank system work at industrial facilities. While this regulation is drafted in such a way as to ensure that UST contractors are adequately experienced to do the relevant job, it is also drafted in such a way as to tie the hands of experienced engineers at facilities across the state who are experts at handling piping that transports volatile and hazardous substances. For example, facilities may have teams of engineers and pipefitters who are all perfectly qualified to undertake piping tightness testing (as they do on a regular basis for all manner of piping at the facility). Those individuals may have conducted hundreds of piping tightness tests throughout the facility, but because they have only conducted seven or eight such tests on petroleum product tanks, they would not have the requisite experience under the UST regulation to be certified as Class C. The facility would then be required to hire a consultant who is certified by the State of West Virginia to conduct the tightness testing. It is easy to predict cases where a consultant may have far less experience in a real world sense than the engineer at the plant site to handle the piping repair.

Accordingly, the WVMA suggests that the emergency rule be withdrawn, and the legislative rule replace the experience requirement of two years rather than the "ten times" requirement in the emergency rule. In the alternative, DEP could require in the legislative rule that Class C applicants -- who will conduct only tank tightness testing and associated procedures -- demonstrate active participation in two (2) tank tightness tests conducted within a three year period preceding the submission of the application for a Class C certification. Such a requirement would be tailored to the type of activity to be performed under a Class C permit, avoiding the problem invited under the current regulatory language where, for example, an applicant with participation in ten tank closures would have made an adequate experience showing for tank tightness testing. These two sets of activities require completely different skills.

## **2. Registered Professional Engineer Requirement**

The last sentence of section 3.4.4 provides that an applicant who is a registered professional civil or mechanical engineer duly licensed by the State Board of Registration as a professional engineer of West Virginia may substitute the license for the required experience for a Class A or Class B certificate. There is no explanation why an engineering degree may not be substituted for experience for Class C. The tasks to be undertaken by persons certified as Class C require less experience and less skill than persons in Classes A or B, so a professional civil or mechanical engineering degree should be more than adequate to meet Class C requirements.

We note that Section 3.4.4 has limited the experience requirement to engineers registered in West Virginia, which we believe is inappropriate. We also suggest that any registered professional engineer in West Virginia or outside the state is amply qualified to meet Class C experience requirements. We encourage the DEP to recognize equivalent engineering programs in other states.

We suggest that Section 3.4.4 be redrafted as follows:

Applicants for Class A or Class B certification must demonstrate active participation in a minimum of ten (10) regulated underground storage tank system installations, repairs, retrofits, upgrades, performances of a change-in-service, closures and/or tightness testing conducted after December 22, 1988 as is applicable to the Class A or Class B certificate. Applicants for Class C certification must demonstrate active participation in a minimum of two (2) regulated underground storage tank system tightness testing procedures conducted within three years preceding submission of the application for Class C certification. For Classes A, B, and/or C certificates, closely related work experience may be substituted upon approval by the Director. An applicant who is a registered professional, civil, or mechanical engineer duly licensed by the State Board of Registration for Professional Engineers of West Virginia or with an equivalent license from another state, may substitute this license for the required experience for Classes A, B, or C.

In the event that DEP chooses to withdraw this emergency rule and promulgate it as a legislative rule, we would urge DEP to consider allowing certified geologists to substitute their qualifications for the required experience for Class B certifications. Geologists are well qualified for Class B certification, which covers change-in-service and closures.

**C. Sections 3.5.1.b and 3.5.1.c**

Section 3.5.1 provides that an individual may renew his or her certificate for another two year period by paying a renewal fee and submitting a certificate of renewal application. The emergency rule adds a provision that, in addition to demonstrating completion of sixteen hours of director-approved continuing education training courses, the applicant must now also demonstrate that he or she has participated in at least one job applicable to the class of certification within the certification period. This section is a new and is completely unrelated to the stated purpose of the emergency rule, which is to make sure that Class C certification does not extend too much authorization to the Class C certificate holder to conduct underground storage tank installations and other complex tasks. While we appreciate that this section may be justified and reasonable, it is inappropriate for the director to include modifications to this rule, however appropriate they may seem, in an emergency rule. The emergency rule is effective from the date of filing without opportunity for public notice or comment. If DEP finds it necessary to make other adjustments, however minor, to the rule, they should be done in the ordinary course of notice and comment rulemaking. For the same reasons, this comment is applicable to section 3.5.1(c).

**D. Sections 4.3 and 4.6.1**

This section has been changed to indicate that all owners and operators of tank systems to be installed on or after June 14, 1993 must notify the director in writing at least 30 days prior to beginning of installation. The prior language of the regulation

requires this notification to begin on the effective date of the rule. This change is inappropriate. Although the prior underground storage tank regulation required this notice to have begun on June 14, 1993 (the effective date of the rule), the extent that prior underground storage tank regulation may have required this notice to have begun on June 14, 1993 (the effective date of the rule), the regulation as it is renewed cannot set effective dates for action prior to the effective date of the regulation. To make dates retroactive in this manner, however reasonable it may seem, is constitutionally prohibited. The prior regulation in its past incarnation would continue to be effective, along with any notification requirements contained within it, until superseded by a subsequent regulation. That subsequent regulation should take effect beginning on its effective date; thus, the notification provision has full coverage through the prior and current effective regulations with no "gap." We encourage DEP not to make this date retroactive.

**E. Section 4.7.1**

Under the old rule, a new UST owner was required to provide notification of the UST transfer to the DEP within thirty days of the transfer. The emergency rule adds the requirement that the new UST owner provide DEP proof of financial responsibility in accordance with the requirements of 40 C.F.R. Part 280 Subpart H. It is procedurally improper, regardless of the merits of this change, for DEP to make these changes in an emergency rule. To do so exposes the change to legal challenge. We suggest DEP remove this change from the emergency rule, or withdraw the emergency rule and issue it as a legislative rule for public comment.

Should DEP withdraw the emergency rule and issue the regulation as a legislative rule, we encourage DEP to reconsider this requirement. While we understand that DEP is concerned that tank owners and operators can meet financial responsibility requirements, this provision is largely duplicative of the requirements of the carrier rule (section 5 of the Underground Storage Tanks regulation), serving the same purpose without being as effective. We encourage DEP to carefully consider each additional paperwork requirement that it imposes on the regulated community. While each one makes sense in a vacuum, together they become time-consuming and expensive, especially for facilities with multiple tank systems. For a more streamlined regulatory program, a better approach would be to consolidate paperwork and fee requests to an annual basis on one comprehensive form.

**III. CONCLUSION**

The WVMA appreciates the opportunity to comment on the emergency rule changes to the Underground Storage Tank Regulation and to offer comments and suggestions for changes.

Robert L. Foster  
Vice President of Environmental Affairs  
West Virginia Manufacturers Association  
2001 Quarrier Street  
Charleston, West Virginia 25311  
(304) 342-2123

Prepared by:  
Robinson & McElwee  
Post Office Box 1791  
Charleston, West Virginia 25326  
Contact: Karyn M. Schmidt, Esquire  
(304) 347-8329