AMERICAN ELECTRIC POWER

American Electric Power
1 Riverside Plaza
Columbus, OH 43215
aep.com

West Virginia Department of Environmental Protection
E-mail: WVDEPTankRules@wv.gov

October 9, 2014

Re: 47 CSR 62 Interpretive Rule – Initial Inspection, Certification, and Spill Prevention Response Plan Requirements

This letter provides American Electric Power's (AEP) comments on Interpretive Rule 47 CSR 62 Initial Inspection, Certification, and Spill Prevention Response Plan Requirements, filed on September 9, 2014. The comments provided herein request clarification and provide recommendations to modify the final rule, for the West Virginia Department of Environmental Protection's (WVDEP) consideration.

§47-62-2 Definitions

1. We recommend the definitions for "Level 1 AST" and "Level 3 AST" be revised to include reference to "filtered *and unfiltered* surface *and ground* water" (changes in *italics*) as naturally occurring water, both surface and ground, may be held in tanks for various purposes and does not pose any different risk.

2. As defined in §47-62-2.2.a, an AST within a zone of critical concern, wellhead protection area, or groundwater intake area under the influence of surface water is automatically considered a Level 1 AST. Although a definition is provided for "wellhead protection area" under §47-62-2.5, the phrase *public water supply* within the definition is not defined elsewhere in the interpretive rule or in the Aboveground Storage Tank Act. A definition for "groundwater intake area under the influence of surface water" is also not included. In order to adequately determine whether regulated tanks are automatically considered Level 1 ASTs based on their location within these areas, we recommend these terms be appropriately defined, the definitions reflect the same terminology as provided in the rule or Act, and that those words and phrases are used consistently throughout the program.

3. The definition of "Level 1 AST" includes an AST located within a zone of critical concern, wellhead protection area, or groundwater intake area under the influence of surface water. Based on the context of this rule, we understand these terms have their meanings prescribed in the WV Source Water Protection Program. However, we do not find anywhere in the rule where this is explicitly stated. In fact, the definition of "wellhead protection area" is fairly generic in nature. Therefore, we strongly urge WVDEP to clarify that the scope of the areas that determine whether an AST is Level 1 are those that were formally determined by the

WV Department of Health and Human Services under the state's implementation of the federal Safe Drinking Water Act, Source Water Protection requirements.

4. We believe the rule is vague with respect to what could qualify as a Level 3 AST, defined in §47-62-2.4 as having "the potential for low risk of harm to public health or the environment due to contents, size, or location or because the AST is subject to strict regulations, including regular inspections, under another program...." Although a list follows the definition identifying tanks included as Level 3 ASTs, tanks regulated under other regulatory programs, such as the federal Spill Prevention, Control and Countermeasure (SPCC) requirements of §40 CFR 112 and West Virginia Groundwater Protection Regulations of §47-58, are also subject to strict regulations, including regular inspections. It is unclear whether the list provided in the definition is inclusive of all the ASTs that are considered Level 3 ASTs. We recommend including tanks regulated under the federal SPCC requirements and West Virginia Groundwater Protection Regulations as Level 3 ASTs and incorporating that criteria into the definition.

§47-62-3 Initial Inspection and Certification

1. Per WVDEP's *Aboveground Storage Registration Guide*, "non-operational" tanks are those that are empty, and fluids will not be deposited in or dispensed from the tank on or after June 6, 2014. "Permanently out of service" tanks are empty, clean, and rendered incapable of holding fluid. Since these tanks are empty and will either not be used in the future or are incapable of holding fluid, we recommend that only tanks registered as "currently in service" or "temporarily out of service" be subject to the initial inspection and certification requirements of §47-62-3.

2. The WV AST Act requires an annual inspection and certification of all tanks. The proposed interpretive rule provides some clarification that Level 1 tanks must be certified by either a professional engineer registered in West Virginia, or an API or STI certified inspector. Inspection may be done by a person directly under the supervision of such person. Level 2 and 3 tanks may also be inspected by the owner or operator, or someone under their direct supervision, and may be certified by the owner or operator. For all levels of tanks, the inspections must be done in accordance with the applicable industry standards and WVDEP's "checklist" in Appendix B. We find this arrangement problematic on several levels:

   a. It is unrealistic to expect owners or operators other than professional engineers or API/STI certified inspectors to be able to conduct inspections per "industry standards". These standards are complex technical documents that require significant study and experience to properly implement. This seems to have the effect of requiring all levels of tanks to be inspected and certified by licensed professionals.

   b. True determination of fitness for service in accordance with "industry standards" may necessitate an internal, non-destructive testing of the tank structure. Expecting a licensed person to make such a certification for this interim period is unrealistic and unduly jeopardizes that person's license.

c. The same certification form and statement are to be used in all cases, whether inspected by a licensed professional, or owner/operator. The nature of the certification may qualify under the definition of "practice of engineering" and therefore anyone other than a professional engineer signing such a certification may be violating the regulations of the Professional Engineering Board.

d. The certification statement indicates the tank meets "minimum standards" established by WV Code 22-30. In fact, the Code contains no specific standards relative to inspections but instructs WVDEP to promulgate such standards. Again, reference to any standards by WVDEP is limited to general references to "industry standards" and the WVDEP checklist. We note that the level of detail in the checklist is unclear to be able to determine WVDEP's expectations. For example, the first item on the checklist is "AST Design". The only clarification is that the AST "continues to meet design standards." How is this to be accomplished where historic information on the tank may be inadequate or unavailable? Further, assessment of condition vs. design standards would seem to be something that only a licensed individual should rightly perform, or someone under their direct supervision. Similarly, the checklist requires a determination that the AST was constructed with the "proper foundation". This is something that could only be certified by a licensed engineer or tank inspection professional.

We anticipate that individuals, including both licensed professionals and owner/operators, have significant reservations regarding their liability in certifying a tank as "Fit For Service" given the current guidance on the expected content of the initial inspection. We strongly suggest WVDEP provide clarification for this initial inspection that the expectation of the agency is limited to a visual examination of external surfaces of tanks; connections and appurtenances; and containment and operation of any leak detection system. Further, any initial "certification" should be limited to acknowledgement that the tank is not leaking and any containment system is intact. Given the timeframe allowed for this initial inspection, anything beyond this scope is totally impractical.

§47-62-4 Initial Submission of Spill Prevention Response Plans

1. As described under item 1 for the initial inspection and certification criteria above, we also recommend that only tanks registered as "currently in service" or "temporarily out of service" be subject to the spill prevention response plan submittal requirements of §47-62-4.

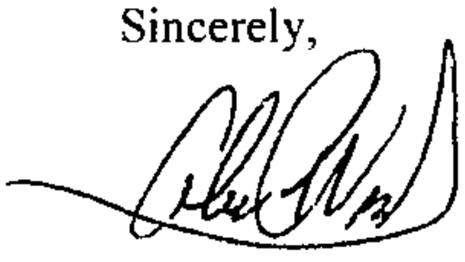
2. Section 47-62-4.3 allows for submittal of a facility's individual SPCC Plan pursuant to §40 CFR Part 112 in lieu of a Spill Prevention Response Plan by December 3, 2014. Under the SPCC rules, a facility's plan is certified by a licensed professional engineer who attests the plan was prepared in accordance with good engineering practice, including applicable industry standards, or in the case of smaller facilities which are authorized to "self-certify" by the owner/operator that the plan is appropriate for the facility. Therefore, to minimize the administrative burden on individual facilities and the WVDEP, we recommend that only a certification that the facility's SPCC plan is current should be required to be submitted to the

WVDEP, and not the entire plan. The approach is consistent with the Groundwater Protection Plan certification requirements of §47-62-4.2.

3. Under §47-62-4.4, only a site-specific Spill Prevention and Response Plan or an Emergency Response Plan pursuant to the Public Health Security and Bioterrorism Preparedness and Response Act is acceptable for Level 3 ASTs. We recommend WVDEP also consider a certification of a current Groundwater Protection Plan or SPCC plan (refer to item 2 in this section) is also acceptable for Level 3 ASTs.

If there are any questions or further information is needed, please contact me at (614) 716-1233 [arwood@aep.com] or Jill Lukehart at (614) 716-2209 [jnlukehart@aep.com].

Sincerely,



Alan R. Wood, P.E.
Director, Water & Ecological Resource Services
AEPSC Environmental Services

Ombler, Tonya K

From: Rajiv Tata <rtata@bakercorp.com>
Sent: Tuesday, October 07, 2014 5:44 PM
To: WV DEP Tank Rules
Cc: Gillenwater, Kelley J
Subject: AST Interpretive Rule Comments - BakerCorp
Attachments: 2014-10 09 InterpretiveRulereInspectionsSPRPs (Baker Edits).pdf

Please find proposed comments/edits to the Interpretive Rule on behalf of BakerCorp, a mobile tank equipment provider.

Due to the mobile nature of the tanks in BakerCorp's fleet, the Interpretive Rule imposes an undue burden on companies like BakerCorp, without accomplishing SB 373's main purposes. For this reason, BakerCorp has provided suggested language edits to the Interpretive Rule to address the following:

- Empty mobile tanks should not be classified as Level 1 Tanks simply based on location or proximity to a water source. BakerCorp's mobile tanks are clean and empty while at BakerCorp locations, and therefore should not trigger a Level 1 classification solely based on the proximity of BakerCorp's place of business to a water body. Providing a specific exemption for empty mobile tanks from the Level 1 classification would avoid the financial burden of having a P.E., or API- or STI-certified inspector perform an inspection.

- BakerCorp tanks are clean and empty when at BakerCorp locations and therefore do not pose a threat to the state's drinking water resources. They should not be subject to the same Spill Prevention Response Plan requirements as permanent, in process holding tanks. Moreover, customers to whom BakerCorp rents its tanks are already usually subject to Spill Prevent Control and Countermeasure ("SPCC") plans, which incorporate BakerCorp's tanks while on rent. Suggested edits to the Interpretive Rule reflect this industry practice, by imposing Spill Prevention Response Plan requirements, on operators, and not owners of ASTs.

Please do not hesitate to contact the undersigned with any questions or comments.

Rajiv A. Tata
Assistant General Counsel
3020 Old Ranch Parkway, Suite 220
Seal Beach, California 90740
Ph: (562) 342-7960
Fax: (562) 342-2016
Cell: (562) 343-4630

>BAKER

TITLE 47
INTERPRETIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

SERIES 62
INITIAL INSPECTION, CERTIFICATION, AND SPILL PREVENTION RESPONSE PLAN REQUIREMENTS UNDER W. VA. CODE §§ 22-30-6 AND 22-30-9

§47-62-1. General.

1.1. Scope. – This Interpretive Rule provides guidance and clarification for complying with the initial inspection and certification requirements set forth in the Aboveground Storage Tank Act ("the Act") at W. Va. Code § 22-30-6 and the requirements for submitting Spill Prevention Response Plans set forth in the Act at W. Va. Code § 22-30-9.

1.2. Authority. – W. Va. Code § 22-30-23

1.3. Filing Date. –

1.4. Effective Date. –

The Spill Prevention Response Plan requirements of this Interpretive Rule shall apply to operators, and not owners, of mobile tanks.

1.5. Applicability. – This Interpretive Rule applies to owners or operators of aboveground storage tanks, as that term is defined in W. Va. Code § 22-30-3(1), who are required to complete an inspection of all registered tanks and to certify that inspection to the Department of Environmental Protection on or before January 1, 2015, and to submit to the Department of Environmental Protection a site specific Spill Prevention Response Plan for all registered tanks or tank facilities on or before December 3, 2014. This Interpretive Rule shall continue from its effective date until June 1, 2015, unless sooner terminated, continued or reestablished as a Legislative Rule pursuant to W. Va. Code § 29A-3-1, et seq.

1.6. Purpose. – This Interpretive Rule is designed to protect the public water supply resources, the health and safety of our citizens, the environment, and the economy of the State of West Virginia from potentially dangerous substances stored in aboveground storage tanks.

§47-62-2. Definitions.

2.1. "AST" means aboveground storage tank.

2.2. "Level 1 AST" means an AST that is determined by the Secretary to have the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264. An AST that meets any of the following criteria is a Level 1 AST:

empty mobile tanks,

2.2.a. An AST located within a zone of critical concern, wellhead protection area or groundwater intake area under the influence of surface water; or

2.2.b. An AST that contains substances defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as a "hazardous substance" (42 U.S.C. § 9601(14)); or

2.2.c. An AST with a capacity of 50,000 gallons or more, regardless of location or contents; or

2.2.d. Any AST, regardless of contents, size or location, that the Secretary determines exhibits a potential for high risk of harm to public health or the environment. The Secretary, in his or her discretion, may consider factors including, without limitation, tanks that contain substances that are on the federal Environmental Protection Agency's "Consolidated List of Chemicals Subject to the Emergency Planning and Community Right to Know Act (EPCRA), CERCLA, and § 112(r) of the Clean Air Act (CAA)" (known as "the List of Lists") as provided by 40 C.F.R. §§ 355, 372, 302, and 68), regardless of the AST's location. The Secretary shall provide notice to the AST owner or operator of the Level 1 designation.

2.3. "Level 2 AST" means an AST that is determined by the Secretary to have the potential for lesser risk of harm to public health or the environment than a Level 1 AST due to its contents, size or location (i.e., an AST located in an isolated area with respect to public water systems, waters of the State or populated locales), or an AST that does not qualify as either a Level 1 AST or a Level 3 AST.

2.4. "Level 3 AST" means an AST that is determined by the Secretary to have the potential for low risk of harm to public health or the environment due to its contents, size or location or because the AST is subject to strict regulations, including regular inspections, under another program (i.e., ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under W. Va. Code § 22-18-1, et seq. and 40 C.F.R. § 264).

2.5. "Wellhead protection area" means the surface and subsurface area surrounding a well, wellfield or spring that supplies a public water supply through which contaminants are likely to pass and eventually reach the water well(s).

§47-62-3. Initial Inspection and Certification.

3.1. For Level 1 ASTs, the initial inspection of each tank shall be performed by a qualified professional engineer; or by a qualified person working under the direct supervision of a professional engineer; or by an individual certified to perform tank inspections by the American Petroleum Institute (API); or by a person certified to perform tank inspections by the Steel Tank Institute (STI). The inspection shall be certified by the professional engineer (for those inspections conducted by a professional engineer or a qualified person working under the direct supervision of a professional engineer) or by the API certified inspector or by the STI certified

inspector on a form prescribed by the Secretary and submitted to the Secretary on or before January 1, 2015.

3.2. For Level 2 and Level 3 ASTs, the initial inspection of each tank shall be performed by any of the persons listed in Section 3.1 above; by the owner or operator of the AST; or by any person designated by the owner or operator of the AST. The inspection shall be certified as set forth in Section 3.1 above (if the inspection is conducted by a person listed in that section) or by the owner or operator of the AST (if the inspection is conducted by the owner or operator or a person designated by the owner or operator) on a form prescribed by the Secretary and submitted to the Secretary on or before January 1, 2015.

3.3. Regardless of tank classification (i.e., Level 1, Level 2 or Level 3), the inspections shall be conducted in accordance with the industry standard appropriate to the tank or tank facility (*see*, industry standards in Appendix A) and shall, at a minimum, conform to the requirements set forth in Appendix B.

, or operator of a mobile AST,

§47-62-4. Initial Submission of Spill Prevention Response Plans.

4.1. The owner or operator of a Level 1 AST shall submit a site specific Spill Prevention Response Plan ("SPRP") that, at a minimum, conforms to the requirements set forth in Appendix C and in accordance with W. Va. Code § 22-30-9 by December 3, 2014.

4.2. The owner or operator of a Level 2 AST shall submit a site specific SPRP that, at a minimum, conforms to the requirements set forth in Appendix C and in accordance with W. Va. Code § 22-30-9 by December 3, 2014. Alternatively, if the owner or operator of a Level 2 AST has been issued a permit by the Secretary under Articles 3, 4, 6, 6A, 11, 15 or 18 of Chapter 22 of the West Virginia Code, and thus has also submitted to the Secretary as part of the permitting process a Groundwater Protection Plan, the owner or operator may submit to the Secretary a certification that such plan is current and list the applicable permit number(s) that correspond with such plans; Provided, that the Secretary may request additional information, if necessary, in order to ensure that such plans conform with the requirements of W. Va. Code § 22-30-9.

4.3. The owner or operator of a Level 2 AST who is required to maintain on-site Spill Prevention Plans pursuant to 35 CSR 1 or Spill Prevention, Control, and Countermeasures Plans pursuant to 40 C.F.R. § 112 may submit the applicable plan to the Secretary in lieu of the SPRP by December 3, 2014. The Secretary may request additional information, if necessary, in order to ensure that such plans conform with the requirements of W. Va. Code § 22-30-9. Alternatively, the owner or operator may submit a site specific SPRP that, at a minimum, conforms to the requirements set forth in Appendix C and in accordance with W. Va. Code § 22-30-9 by December 3, 2014.

4.4. If the owner or operator of a Level 3 AST, other than hazardous waste tanks regulated by W. Va. Code § 22-18-1, et seq. and 40 C.F.R. § 264 (i.e., ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes or food or food-grade materials), maintains an Emergency Response Plan as required by the federal Environmental Protection Agency pursuant to the Public Health Security

and Bioterrorism Preparedness and Response Act ("the Bioterrorism Act of 2002"), 42 U.S.C. § 300i-2, the owner's or operator's submission of that plan to the federal Environmental Protection Agency may be in lieu of submission of a SPRP to the Secretary by December 3, 2014. Alternatively, the owner or operator of a Level 3 AST may submit a site specific SPRP that, at a minimum, conforms to the requirements set forth in Appendix C and in accordance with W. Va. Code § 22-30-9 by December 3, 2014.

APPENDIX A

American National Standards Institute
(ANSI)
1819 L Street, NW, 6th Floor
Washington, DC 20036
www.ansi.org

American Petroleum Institute (API)
1220 L Street, N.W.
Washington, DC20005
www.api.org

American Society of Mechanical Engineers
(ASME)
ASME International Three Park Avenue
New York, NY10016-5990
www.asme.org

American Society for Non-destructive
Testing (ASNT)
1711 Arlington Lane
Columbus, OH 43228-0518
www.asnt.org

American Society for Testing and Materials
(ASTM)
100 Barr Harbor Drive
West Conshohocken, PA 19429-2959
www.astm.org

American Water Works Association
(AWWA)
6666 West Quincy Avenue
Denver, CO 80235
www.awwa.org

National Association of Corrosion Engineers
(NACE)
P. O. Box 218340
Houston, TX 77218
www.nace.org

National Fire Protection Association
(NFPA)
Batterymarch Park
Quincy, MA 02269
www.nfpa.org

Petroleum Equipment Institute (PEI)
P. O. Box 2380
Tulsa, OK74101-2380
www.pei.org

Steel Tank Institute (STI)
570 Oakwood Road
Lake Zurich, IL 60047
www.steeltank.com

Underwriters Laboratories (UL)
333 Pfingsten Road
Northbrook, IL 60062
www.ul.com

APPENDIX B

INTERIM INSPECTION CHECKLIST for INITIAL AST INSPECTION

1. **AST Design** (determination that the AST continues to meet design standards)

2. **AST Construction and Installation** - including but not limited to:
   - Determination of proper foundation
   - Compatibility of AST system with material stored

3. General Maintenance and Testing of AST system – Examination of the tank system exterior surfaces for:
   - Flaws
   - Areas of wear
   - Corrosion
   - Distortions
   - Deterioration
   - Any other conditions that might adversely affect structural integrity such as results of a leak test, internal inspection, or other tank integrity examination such that a determination on the suitability of the tank for continued use can be clearly established.

4. **Corrosion Protection and Maintenance** (existing and past corrosion protection) - Provide assessment of the following, as applicable:
   - Galvanic and/or Impressed Current Systems
   - External Coatings
   - Internal Coatings or liners

5. Release Detection Method and Procedures

6. Release Prevention Methods and Procedures

7. Secondary Containment Structures (including the following):
   - Capacity requirements (including sufficient freeboard for precipitation events)
   - Compatibility requirements
   - Soundness/Integrity

8. Record Keeping:
   - Leak Detection System
   - Corrosion Protection system
   - General Operation and Maintenance (including upgrades and repairs to AST system)

APENDIX C

SPILL PREVENTION RESPONSE PLAN CHECKLIST

1. Fully Identify and Describe the Activities and Processes that Occur at the Site.

2. Identify Applicable Hazard and Process Information Including the Following:

- A list (name and Chemical Abstract Service number) of all types of fluids stored in ASTs
- Amount of fluids stored in each AST (provide maximum capacity and average storage volumes)
- Name and amounts of wastes generated that are stored in ASTs

3. Material Safety Data Sheets (MSDS) for Each Fluid Stored in ASTs at the Location.

- The MSDS must include the health hazard number identified by the national Fire Protection Association

4. Provide Site Maps/Drawings of the Aboveground Storage Tank Facility, to Include the Following Information:

- Show site boundary, abutting properties, nearby streets and/or waterways
- Identify and locate major on-site structures, including all ASTs and buildings
- Identify and locate all drainage pipes and water outlets
- Identify and locate all monitoring and/or observation wells
- Show legend, north arrow, and scale (preferably 1"=10' to 1"=25')

5. Provide a Preventive Maintenance Program Detailing the Following:

- Leak detection monitoring
- Inspection procedures
- Identification of AST System stress points
- Employee training programs
- Corrosion protection and monitoring
- Security Systems
- Spill prevention measures

6. Emergency Response Information:

- Identify all facility staff to include name and title with duties and responsibilities for developing, implementing, and maintaining the facilities Spill Prevention Response Plan
- Provide detail description of the chain of command at the aboveground storage tank facility
- Contact information for all facility emergency coordinators
- Contact information for all known emergency response contractors
- Detail the specific response that the facility and contract emergency personnel shall take upon the occurrence of any release of fluids from an AST at the facility
- Provide contact information for the person or persons to be notified in the event of a release from an aboveground storage tank. At a minimum this list should include contact information for the following:
  - County and municipal emergency management agencies
  - The nearest downstream public water supply (this information will be provided to the tank owner by WVDEP when their AST registration is approved, for inclusion in this plan)
  - WVDEP Spill line (1.800.642.3074).

CLIFFS MINING SERVICES
Mark Nelson, Vice President – Operations
PO Box 338, Pineville, WV 24874
(304) 320-3179 www.cliffsnaturalresources.com

October 6, 2014

West Virginia Department of Environmental Protection
Secretary Randy Huffman c/o Public Information Office
AST Interpretive Rule Comments
601 57th Street SE
Charleston, WV 25304

Re: Public Comment on Title 47 Interpretive Rule (47CSR62)

Dear Secretary Huffman,

Cliffs Natural Resources offers the following comments regarding DEP's Sept. 9, 2014, Interpretive Rule regarding aboveground storage tank inspections and spill prevention response plan requirements under W.Va. Code §22-30-6 and §22-30-9.

Cliffs is an international mining and natural resources company headquartered in Cleveland, Ohio. We are the leading North American supplier of iron ore pellets and a significant producer of metallurgical coal. In West Virginia, Cliffs operates the Pinnacle mine (underground) in Wyoming County and Cliffs Logan County Coal, which consists of two underground mines and a surface mine. Cliffs also operates coal preparation plants in Wyoming and Logan counties.

We appreciate DEP's issuance of the Interpretive Rule to protect the public water supply resources, the health and safety of our citizens, the environment and the West Virginia economy from potentially dangerous substances stored in aboveground storage tanks (ASTs). While the guidance is helpful, we have some concerns and questions that remain unanswered as the AST program gets under way. We respectfully submit the following for consideration as DEP continues its work on the comprehensive rule to implement the new regulatory program created by Senate Bill 373.

I. **Level 1 Tank Definition §47-62-2.2c**:

Under the Interpretive Rule, a Level 1 AST has the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264.

Our Pinnacle Mine complex has three steel tanks that we have registered and must be treated as Level 1 tanks because they are larger than 50,000 gallons. These tanks are not located within zones of critical concern, a wellhead protection area or groundwater intake area under the influence of surface water. These tanks do not contain substances defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as a "hazardous substance" (42 U.S.C. § 9601(14)).

Each of the three tanks has a capacity of 300,000 gallons, and that is the only factor under the Interpretive Rule that requires them to be registered and regulated as Level 1 tanks. One tank holds preparation plant "make-up" water. The other two tanks contain water to be treated and used in the mine bath house, warehouse and plant and for fire suppression. The water is not filtered surface water – it is pumped from underground reservoirs in old mine works.

The water in all three tanks meets effluent limits and can be discharged directly into the stream. No residents could be affected by these tanks if they were to fail. Tank failure would not cause flooding or drinking water contamination to any homes or businesses.

Cliffs would like the comprehensive rule to remove the 50,000 gallon requirement (§47-62-2.2c) for ASTs to be listed as Level 1 tanks when neither their contents nor locations pose any risk of flooding or contamination to the public drinking water supply.

II. Section 5 waivers (§22-30-25):

Continuing the discussion on tank contents, based on our reading of SB373, §22-30-25 provides waivers for tanks that "do not represent a substantial threat of contamination." Given that definition, we propose the following:

- Tanks that contain water produced from coalbed methane wells and conventional gas wells should be exempted from the new regulatory program, especially CBM wells drilled in the Pocahontas 3 and 4 coal seams, because the quality of produced water is high enough for land application without requiring any chemical treatment.
- We suggest the rules contain waivers for all chemical tanks used for water and pond treatment around mine sites. Examples of such tanks include those containing various flocculants, liquid caustics, oxidizers, de-scalers and other similar pond treatment chemicals. These chemicals already are discharged under a controlled manner into streams via pond discharges, thereby obviating any substantial threat of contamination.
- Similarly, tanks containing certain other chemicals could be granted waivers under Section 5 based on their potentials for hazards, or lack thereof. Examples include tanks containing liquids for freeze proofing, dust control

and others that are sprayed directly onto the ground on haul roads and coal piles. These substances already make it into streams during rain events and thus do not represent a substantial threat of contamination.

III. Tank Registration:

The tank registration deadline (Oct. 1) will pass before the Interpretive Rule will be finalized, and even before the public comment period ends, but it leaves unanswered some questions about tank registration.

- If a tank is on a permitted area, but the tank is not owned by the permitee, how will DEP handle the issuance of violations if the tank owner fails to register the AST?
- How does a tank get removed from registration after it has been removed from the property?

IV. Spill Prevention Response Plans (§47-62-4):

The Interpretive Rule specifies all tank owners are to submit site-specific Spill Prevention Response Plans that conforms to the requirements set forth in Appendix C in accordance with §22-30-9 by Dec. 3, 2014. Will coal operators be allowed to incorporate the new tank requirements into their existing Groundwater Protection Plans rather than creating an entirely new plan? This would eliminate the need for an additional plan to cover the same tanks, since many tanks already are covered under both Groundwater Protection Plans and Surface Water Protection Plans.

V. Tank Inspections:

Who will be handling inspections for DEP? If the inspection group is not from the Office of Mining and Reclamation, they likely will not be trained on safety issues related to coal mining. SB373 does not outline that training for inspectors will be required, nor does the law provide that companies can refuse entry to anyone not trained or not using appropriate personal protective equipment such as a hard hat, hard-toed footware, etc. Safety is of utmost importance at our operations, and that includes the safety of visitors to our work sites.

Again, thank you for the opportunity to submit comments on the AST program as the regulatory structure comes together. We appreciate the openness with which DEP has approached the construction of the AST program following passage of SB373. Please do not hesitate to contact me with any questions about our comments.

Kind regards,

Mark Nelson,
Vice President –Operations
Cliffs Natural Resources, North American Coal

CONSOL Energy Inc.
CNX Center
1000 CONSOL Energy Drive
Canonsburg, PA 15317 6506

phone: 724/485-3011
fax: 724/485-4923
e-mail: matthanley@consolenergy.com
web:

MATTHEW HANLEY
Supervisor – Environmental Regulatory Affairs

09 October 2014

West Virginia Department of Environmental Protection
Public Information Office
AST Interpretive Rule Comments
601 57th Street, SE
Charleston, WV 25304
WVDEPTankRules@wv.gov

RE: AST Interpretive Rule Comments – 47CSR62, Initial Inspection, Certification, and Spill Prevention Response Plan Requirements

To Whom It May Concern:

CONSOL Energy Inc. (CONSOL) a leading diversified energy company headquartered in the Appalachian Basin, and CNX Gas Company LLC (CNX Gas), a wholly owned subsidiary of CONSOL appreciates the opportunity to submit comments to the West Virginia Department of Environmental Protection (WVDEP) in regard to the Aboveground Storage Tank (AST) Interpretive Rule Comments – 47CSR62. CONSOL is in support of protecting West Virginia's drinking water resources and would like to participate in any future process for public input or advisory panels/work groups.

As a producer of both coal and natural gas CONSOL has a unique perspective as a stakeholder. As such CONSOL would like to submit the following input in regards to the interpretive rule:

<u>General AST Interpretive Rule Comments</u>

- The deadline for submittal of inspection and certification for all ASTs in West Virginia is January 1, 2015. Taking into account the development of the interpretive rule and associated comment period, a reasonable extension of this deadline would seem appropriate.
  - CONSOL and CNX Gas together have more than 3,800 ASTs that require registration. A one year extension to January 1, 2016 for the inspection and certification of registered ASTs is a rational postponement that would allow Operators the time needed to comply with the rule.
  - Alternatively, if WVDEP does not feel an extension of the inspection and certification requirement for Level 1 ASTs is appropriate, we would ask for an extension to January 1, 2016 for Level 2 and Level 3 ASTs.

- CONSOL would like to again address the exemption from permitting for mobile tanks, trucks or rail cars that are located on a site for less than sixty consecutive calendar days. While the sixty day threshold may seem reasonable, oftentimes "temporary" ASTs are on-site for longer than 60 days in part due to delays that are outside of the operator's control. These delays can include permitting and construction windows for species protections, equipment lead times, and extenuating weather circumstances. CONSOL would recommend that the sixty (60) calendar day cutoff be extended to a more appropriate period of time. CONSOL recommends that tanks on site for less than ninety (90) days be considered temporary, and therefore exempt. Alternatively, a process should be developed through which an Operator can request an extension of temporary status to avoid burdensome registration, plan development, certification, and inspection requirements for tanks that will not be permanently stationed. Otherwise tanks associated with drilling or completions activity should be considered process tanks, and therefore exempt.
- CONSOL would like to address the exemptions of equipment or machinery containing substances for operational purposes, including integral hydraulic lift tanks, lubricating oil reservoirs for pumps and motors, electrical equipment and heating and cooling equipment. We feel strongly that methanol and glycol storage tanks associated with processing facilities meet this definition and request that WVDEP specifically state that these storage tanks are exempt from permitting.

<u>AST Interpretive Guidance Document Specific Comments</u>

- Under **§47-62-2.2.3.**, **Definitions**, WVDEP states that "Level 2 AST" means an AST that is determined by the Secretary to have the potential for lesser risk of harm to public health or the environment than a Level 1 AST due to its contents, size or location (i.e., an AST located in an isolated area with respect to public water systems, waters of the State or populated locales), or an AST that does not qualify as either a Level 1 AST or a Level 3 AST.
  - This definition is overly broad. A list outlining examples of applicable tank types should be provided by WVDEP. Clarity is especially necessary for the Level determination of brine tanks. Further elaboration by the Department as to which tanks meet this definition will greatly improve tank owners and operators ability to satisfy applicable plan development, inspection, and certification obligations.
- As currently written, the proposal does not clearly indicate that measures acceptable for Level 1 tanks are also acceptable for Level 2 or 3 tanks. Additionally, there is no language that states plans acceptable for Level 2 tanks are also acceptable for Level 3 tanks. While it may have been the intent of the Department to apply this type of logic, we would strongly recommend adding this language to the proposal. This distinction is

necessary in order to avoid confusion regarding spill plan submittal requirements for Level 2 and 3 tanks.

- Language should be added to §47-62-2.2.3. similar to the language contained in §47-62-2.2.4. to indicate that Level 2 ASTs may already be subject to the state and federal regulations and associated plans covered in §47-62-4.4.2.
- Notification of a Level 1 tank designation as described in 47-62-2; 2.2.d should be expanded to all tanks that are part of the registration process. If the Department and Operator do not agree on the level determined through the use registration information, due process should be available to the Operator in order to justify an alternative designation.

CONSOL supports the protection of public drinking water sources and the WVDEP effort to ensure waters of the state of West Virginia are protected. We also appreciate the opportunity to comment on the AST Interpretive Rule development and look forward to working with WVDEP to ensure continued protection of WV water resources. If you have any questions, comments, or would like to discuss further, please do not hesitate to contact me.

Regards,

Matthew Hanley
Supervisor – Environmental Regulatory Affairs
CONSOL Energy, Inc.

cc: Frank Calderon, General Manager – Environmental Compliance and Regulatory Affairs, CONSOL
Carrie Crumpton, Director – Environmental Compliance and Regulatory Affairs, CONSOL

Ombler, Tonya K

From: L DADISMAN <ldadisman@yahoo.com>
Sent: Monday, September 29, 2014 7:19 PM
To: WV DEP Tank Rules
Subject: SB 373 Above Ground Storage Tank Water bill

West Virginia Department of Environmental Protection Public Information Office AST Interpretive Rule Comments
601 57th Street SE
Charleston, WV 25304

Re SB 373 Above Ground Storage Tank Water bill

Dear Representative,

I am concerned that the corporate responsibility has been minimized by a tank size rule.

The amount or tank size of chemicals does not lesson destruction of drinkable water but whether by any amount its contents is of a poisonous nature, environmentally harmful chemical, or will it cause drinking water to be demised by way of ruptures, hidden or underground leakage.

Tanks located near rivers or streams should be removed and placed where they can be controlled for any type of leakage. Core drillings downhill should be taken to assure containment of existing tanks and piping. Funds by tank holders should be received to ensure continuous inspections and that these parties conform to existing laws.

State, counties, and cities emergency systems need to be able, ready with proper equipment,and knowledgeable of the chemicals in our state to be safe in handling chemical leaks if they should occur.

Larry B Dadisman
912 Greendale Dr
Charleston, WV 25302_3224
ldadisman@yahoo.com

LBD
WV The back side of the mountain does not see as much sunshine but just enough!

Ombler, Tonya K

From: WV DEP Tank Rules
Sent: Friday, October 10, 2014 10:24 AM
To: Ombler, Tonya K
Subject: This one's on the emergency rule, but I'm forwarding anyway

From: Jim Daley [mailto:JDaley@ngeconsulting.com]
Sent: Tuesday, September 30, 2014 5:11 PM
To: WV DEP Tank Rules
Subject: Two comments on the Rough Draft Emergency Rule

Dear Sir/Madam:

As you are working toward a December draft emergency rule, please consider the following:

As written, this rule treats interim inspections prior to the rule once adopted, as completely separate and unrelated to inspections once the rule is adopted. However, this can create a burden on those companies who elected to have their tanks inspected under the interim program by a P.E. or certified tank inspector, since the emergency rule addresses "the initial inspection under this Rule," which requires a P.E. or certified tank inspector for the initial and periodic (three or five-year cycle depending upon level) inspections. There needs to be a mechanism that ties the two inspection programs, pre- and post-rule together, such that companies who already have had professional inspections do not have to repeat them again in the first year, but rather default to the schedule of periodic inspections, timed from the pre-rule inspection that was done.

Also, there will be a tremendous issue with secondary containments at oil and gas sites. These generally isolated sites, with maybe two tanks each, typically have an earthen berm around them, oftentimes large enough to contain the required volume, but with no liner or other measures to meet the stringent permeability rates of the emergency rule. We are talking about maybe 30,000 tanks that would not meet these permeability restrictions, but are very low hazard in remote areas away from public water supplies. Surely there was no legislative intent to require reconstruction of these dike systems to include clay or synthetic liners, especially within a 90-day period as indicated in the rough draft. There really needs to be an exemption for brine/produced water tanks or an extended compliance period of say five years to allow firms to budget for and implement upgrades that conform with the proposed rule.

Thanks for considering these comments as you move forward.

James R. Daley, PMP
Director of Environmental Services
NGE (Novel Geo-Environmental, LLC)
171 Montour Run Road, 2nd Floor
Moon Township, PA 15108
Main: 412.722.1970
Cell: 724.612.2652
Fax: 412.722.1929
E-mail: jdaley@ngeconsulting.com
My Profile: http://www.linkedin.com/in/jamesrdaleypmp/
Company Profile: http://www.linkedin.com/company/nge?trk=biz-companies-cyf
Company Website: www.ngeconsulting.com

Ombler, Tonya K

From: Gary DeLuke <garyldeluke@gmail.com>
Sent: Thursday, October 09, 2014 9:41 PM
To: WV DEP Tank Rules
Subject: SB 373

1. **I support the interpretive rule maintaining important deadlines.**

   - Public safety cannot be delayed. I support initial spill plans and inspections completed by the deadlines set forth in SB373.

   - I acknowledge that the interpretive rule is a compromise that provides flexibility for tank owners to efficiently meet initial deadlines.

2. **I support a Level 1 tank classification that is protective of the environment and public health.**

   - The definition of a Level 1 AST in the interpretive rule should be revised to match the definition in the rough draft emergency rule. Hazardous substances on the "Lists of Lists" should be automatically classified as Level 1.

   - The Secretary should use the registration database to immediately identify ASTs that do not automatically fit the Level 1 definition, but pose a significant risk, and use his discretionary authority to classify them as Level 1.

--
Gary L. DeLuke
Mobile 304.745.7257

Pamela F. Faggert
Chief Environmental Officer and
Vice President-Corporate Compliance

Dominion Resources Services, Inc.
5000 Dominion Boulevard, Glen Allen, VA 23060
Phone: 804-273-3467

dom.com

Dominion

BY ELECTRONIC DELIVERY
Email: WVDEPTankRules@wv.gov

October 9, 2014

West Virginia Department of Environmental Protection – Public Information Office
AST Interpretive Rule Comments
601 57th Street SE
Charleston, WV 25304

RE: Draft Interpretive Rule for Initial Inspection, Certification, and Spill Prevention Response Plan Requirements under W. Va. Code §§22-30-6 and 22-30-9

Dear Sir or Madam:

Dominion Resources, Inc. is pleased to respond to the West Virginia Department of Environmental Protection's (the Department's) request for comments regarding the Draft Interpretive Rule for Initial Inspection, Certification, and Spill Prevention Response Plan Requirements under W. Va. Code §§22-3-6 and 22-30-9 (Draft Interpretive Rule). Dominion is one of the nation's largest producers and transporters of energy, with a portfolio of approximately 23,600 megawatts of generation, 10,900 miles of natural gas transmission, gathering and storage pipeline and 6,400 miles of electric transmission lines. Dominion operates one of the nation's largest natural gas storage systems with 947 billion cubic feet of storage capacity and serves utility and retail energy customers in 10 states.

We are a member of the West Virginia Oil and Natural Gas Association (WVONGA). We support the comments submitted by WVONGA on behalf of its members and believe their comments make a strong case for additional delineation within the draft interpretive rule for aboveground storage tanks that are already adequately regulated or pose no to low risk to West Virginia's public water resources.

In addition to the WVONGA comments, we have the following specific recommendations for improving the draft interpretive rule.

Delineation of Tank Levels

The definition for Level 2 Tanks is located in §47-62-2.3. In essence, a Level 2 Tank is one that is not a Level 1 or Level 3 tank. This definition is incredibly broad and covers a large universe of tanks, many of which may be no or low risk to WV public water resources. We fully support WVONGA's comments that many Level 2 Tanks should be categorically exempt from the Draft Interpretive Rule due to the tank's coverage under existing regulations such as the Natural Gas Pipeline Act and the Oil Pollution Prevention Act. Additionally, we also request the

development of a process where the owner/operator can seek exemption from some or all provisions of the Draft Interpretive Rule based upon the risk associated with the tank. Just as the Department has the ability to upgrade or include a tank under the Draft Interpretive Rule based upon risk, the owner/operator should have the ability to petition the Department for a lower level ranking based upon an evaluation of risk.

Initial Tank Inspections

Subsection 47-62-3.2 includes provisions for inspecting Level 2 and Level 3 tanks. By their definition, Level 3 tanks are determined to have low or no risk based upon their contents, location, or existing regulatory coverage. As Level 3 tanks pose no to low risk to WV public water resources, an inspection does not advance the policy objectives of the Act and initial tank inspections should not be required of these tanks. This concept is reinforced by the draft emergency rule where Level 3 tanks are not subject to the initial tank inspection requirements. Therefore, we request that Level 3 tanks be removed from the initial tank inspection provisions of §47-62-3.2 and 3.3.

Spill Prevention Response Plans

Subsection 47-62-4.4 includes provisions for submitting an initial spill prevention response plan (SPRP) for Level 3 tanks. As stated above, Level 3 tanks are determined to have low or no risk based upon their contents, location, or existing regulatory coverage. As Level 3 tanks pose no to low risk to WV public water resources, the development and submission of an SPRP does not advance the policy objectives of the Act and should not be required of these tanks. This concept is reinforced by the draft emergency rule where Level 3 tanks are not required to submit SPRPs. Therefore, we request that SPRP provisions for Level 3 tanks in §47-62-4.4 be removed from the Draft Interpretive Rule.

Appendix C – SPRP Checklist

We further offer the following edits in red to the SPRP Checklist for clarity:

- Item 2- A list (name and Chemical Abstract Service number, if available) of all types of ~~fluids~~ liquids defined as "hazardous substances" under section 101(14) of CERCLA in excess of 1,320 gallons of pure material stored in subject ASTs.
- Item 2 - Name and amounts of non-hazardous wastes generated that are stored in ASTs.
- Item 3 - ~~Material~~ Safety Data Sheets (SDS), where required by 29 CFR 1910.1200, for Each ~~fluid~~ liquid defined as "hazardous substances" under section 101(14) of CERCLA in excess of 1,320 gallons of pure material stored in subject ASTs at the location.
- Item 6 - Contact information for all ~~known~~ emergency response contractors the owner/operator may contact in the event of an emergency.
- Item 7 - Detail the specific response that the facility and contract emergency personnel shall take upon the ~~occurrence of any~~ release of fluids from an subject AST at the facility.

- Item 7 - Provide contact information for the person or persons to be notified in the event of a release from an subject aboveground storage tank. At a minimum this list should include contact information for the following:
    - County and municipal emergency management agencies.
    - For Level 1 tanks only - The nearest downstream public water supply (this information will be provided to the tank owner by WVDEP when their AST registration is approved, for inclusion in this plan).
    - WVDEP Spill line (1.800.642.3074).

Again, we appreciate the opportunity to comment on this draft interpretive rule and ask that the Department consider the recommendations stated above and in the WVONGA comment submission in the development of their final rule. If you have any questions, please call me at 804-273-3467 or Dennis Slade at 804-273-2658 (dennis.a.slade@dom.com)

Sincerely,

Pamela F. Faggert

Pamela F. Faggert

Ombler, Tonya K

From: Timmy Griffith <griff_22420@yahoo.com>
Sent: Friday, September 26, 2014 2:46 PM
To: WV DEP Tank Rules
Subject: AST Interpretive rule comments

Hello,

This is Tim Griffith commenting on behalf of Jones Oil Company inc. We have a few comments concerning the AST Interpretive rule and how it will effect mobile above ground storage tanks. Our first comment would be that a mobile above ground storage tank (a tank that is in a containment which holds 110% capacity of the tank and has I-beam skids underneath the containment) could be moved multiple times within a month to two month period depending on the needs of our customers. This constant movement could create problems for for our company and others with mobile tanks. Moreover, operators of mobile above ground storage tanks could need to relocate mobile tanks to different locations on their property multiple times depending on company needs.

Our next comment is that regular maintenance is done on all of our tanks and the tanks are monitored routinely to keep them in compliance with above ground tanks regulations. Furthermore, all of our mobile above ground storage tanks are self contained units with an outer containment which holds 110% of the tanks capacity. These tanks are not a spill hazard under normal conditions and should not be considered a hazard to the environment.

We feel that mobile above ground storage tanks should be exempt from regulations that would require companies to submit updated spill prevention plans every time a tank is moved. These are just a few of our concerns with the new tanks laws in West Virginia. Please contact me if there is any comments or questions.

Sincerely,

Tim Griffith

Tim Griffith
(606)432-5724 ext.32
(606)794-9034 (mobile)
griff_22420@yahoo.com

Ombler, Tonya K

From: Jim Hatfield <hatfield.jch@gmail.com>
Sent: Thursday, October 09, 2014 11:52 AM
To: WV DEP Tank Rules
Subject: Draft 47CSR62 Interpretive Rule

Please consider these comments regarding the "Draft 47CSR62 Interpretive Rule"...

~~47-62-2 Definitions

The DEP should consider the definition of “Level 1, 2, and 3,” how it’s defined here and how it’s defined in the emergency rules, and insert here the one that is most protective of safe and pure water for the enjoyment and consumption of the residents of West Virginia.

~~47-62-3

Section 3.1

It is unclear what a “qualified person working under the direct supervision of a professional engineer” means. This requires definition. Specifically, what does “qualified” mean? For example: Can they be a contract employee? Can they be a newly hired employee? Do they require any formal education past high school? Also, it is unclear what “direct supervision” means. For example: Does the professional engineer need to be present with the “qualified” person when the inspection is being performed?

For Level 1 testing especially, there can be a huge difference between a professional engineer and a designee. If the designee, not the engineer is the one inspecting the tank, they may not even know appropriate questions or issues to relay to the engineer when “issues” or “gray” areas arise during the inspection. And almost certainly they will not have the language that will be meaningful to the engineer when they need to consult about “issues” and “questions” arising during the inspection. Furthermore, it seems unlikely that all designees would have the background to fill out the Interim Inspection Checklist which includes judgments of such things as proper foundations, flaws and distortions in the tank, quality of coatings, release prevention methods, integrity of secondary containment, etc.

Level 1 tanks should be inspected only by professional engineers or by API or STI certified inspectors.

General comment

I am in favor of the detail called for in Appendix C.

Thanks,

Jim Hatfield

Advocates for a Safe Water System

Ombler, Tonya K

From: Mark D. Clark <MClark@spilmanlaw.com>
Sent: Thursday, October 09, 2014 5:32 PM
To: WV DEP Tank Rules
Subject: Comments of IOGAWV to proposed Interpretive Rule 47 CSR 62 [STB-WORKSITE.FID550525]
Attachments: IOGAWV Comments to Interpretive Rule 47 CSR 62.pdf

Ladies and Gentlemen,

Please accept for filing the attached pdf of the comments of the Independent Oil and Gas Association of West Virginia, Inc.

Please contact me if you have any problems accessing the attachment and I will deliver a hard copy of the comments to your offices.

We look forward to the DEP's responses to these comments.

Mark

Mark D. Clark
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (ZIP 25301)
Post Office Box 273
Charleston, WV 25321-0273
304.340.3876 - office
304.550.0278 - mobile
304.340.3801 - fax
mclark@spilmanlaw.com
View My Bio

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COMMENTS OF IOGAWV ON THE PROPOSED INTERPRETIVE RULE INITIAL INSPECTION, CERTIFICATION, AND SPILL PREVENTION RESPONSE PLAN REQUIREMENTS UNDER W. VA. CODE §§ 22-30-6 AND 22-30-9 – 47 C.S.R. 62

These comments are filed on behalf of the Independent Oil and Gas Association of West Virginia, Inc. ("IOGA") on the proposed interpretive rule titled "Initial Inspection, Certification, and Spill Prevention Response Plan Requirements Under W. Va. Code §§ 22-30-6 and 22-30-9," 47 C.S.R. 62 (the "Interpretive Rule"). Formed in 1959, IOGA is a statewide nonprofit trade association that represents companies engaged in the extraction and production of natural gas and oil in West Virginia, as well as the companies that support these extraction and production activities. IOGA was formed to promote and protect a strong, competitive and capable independent natural gas and oil producing industry in West Virginia, while also protecting the natural environment of our state. IOGA has been in existence during times of boom and bust and its members have a long history of driving innovation in exploration and development of West Virginia's oil and gas reserves. Our members also have a longstanding tradition of working with WVDEP and its predecessor agencies to help regulators understand these innovations and how to regulate new techniques in a manner that protects the environment while promoting the economic development so crucial to West Virginia. It is in this spirit of experience and partnership that IOGA offers these comments.

IOGA has many concerns regarding the West Virginia Department of Environmental Protection's ("WVDEP") implementation of the Aboveground Storage Tank Act ("AST Act"), including the extension of rules beyond those reasonably contemplated by the AST Act. However, IOGA is limiting the scope of its comments to the Interpretive Rule and will submit additional comments on the implementation of the AST Act as necessary and appropriate.

A. General Comments

As an initial matter, IOGA would like to emphasize that its members recognize the critical importance of the safe and effective exploration, drilling and operation of oil and gas wells, consistent with the protection of public water supplies, the environment and public health. IOGA appreciates and supports the stated purpose of the Interpretive Rule which is to "protect the public water supply resources, the health and safety of our citizens, the environment, and the economy of the State of West Virginia from potentially dangerous substances stored in aboveground storage tanks." Decades of experience in developing oil and gas resources in West Virginia and across the United States have demonstrated that oil and gas well operations, including the use of aboveground storage tanks ("ASTs"), is safe and does not pose a substantial risk of adversely impacting public water supplies or valuable water resources.

IOGA supports reasoned and focused implementation of the AST Act and commends WVDEP for its efforts through the Interpretive Rule to balance the demands of the AST Act with the very limited and inadequate timeframes that the statute imposes. Simply stated, the AST Act deadlines would be impossible to fulfill in the absence of the Interpretive Rule; however, the Interpretive Rule can and should be improved as addressed *infra*.

IOGA believes that the majority of the over 47,000 registered ASTs are utilized by the oil and gas industry. IOGA asserts that the operations of its members are located primarily in relatively remote areas of the State and utilize relatively small tanks (100-210 barrel capacity) to collect oil or produced water from oil or gas wells. The collective experience of IOGA members for more than 50 years demonstrates that oil and gas operations are safe and do not compromise public water supplies. In the AST Act, the Legislature instructed WVDEP to develop a regulatory program for new and existing aboveground storage tanks incorporating nationally recognized standards "**and taking into account the size, location and contents of the tanks.**" W. Va. Code § 22-30-5(b) (emphasis supplied). However, IOGA believes that the Interpretive Rule fails to adequately take into account the size, location and contents of the ASTs used in oil and gas operations.

Generally, the Interpretive Rule is too vague and lacking definition to adequately advise AST owners and operators of the actions they must take to avoid the risk of fines and penalties set forth in W. Va. Code § 22-30-17 for failure to comply with the AST Act.

Further, because the Interpretive Rule is subject to a 30-day comment period and a 30-day notice period following WVDEP's eventual adoption of the rule, the Interpretive Rule cannot be effective until **November 8, 2014** at the earliest. *See* W. Va. Code § 29A-3-8. This leaves only 25 days after the earliest possible effective date of the Interpretive Rule for owners and operators to submit Spill Prevention Response ("SPR") Plans (required by December 3, 2014), and only 53 days after the effective date of the Interpretive Rule to perform AST inspections and certifications (required by January 1, 2015). Needless to say, this is unduly burdensome and unreasonable.

Finally, the fiscal note included with the Interpretive Rule fails to address the economic impact of the Interpretive Rule on persons affected by the rules and regulations as required by statute. W. Va. Code § 29A-3-4(b). WVDEP should evaluate the economic impact imposed by the Interpretive Rule on its citizens, including the regulated community.

B. ASTs Subject to SPCC Requirements Should be Categorized as Level 3 Tanks

Section 25 of the AST Act established a waiver of certain requirements of the article for specified categories of ASTs that the Legislature determined either "do not represent a substantial threat of contamination" or "are currently regulated under standards which meet or exceed the protective standards and requirements set forth in [the Act]." W. Va. Code § 22-30-25(a). Among the list of ASTs subject to the statutory waiver are those tanks for which Spill Prevention, Control and Countermeasure ("SPCC") plans are required by the United States Environmental Protection Agency under 40 C.F.R. Part 112, unless located within a zone of critical concern[1] for a public water system. *Id.* § 22-30-25(a)(9). For purposes of the Interpretive Rule, the term "Level 3 AST" encompasses those tanks determined by the Secretary to have the potential for "low risk of harm to public health or the environment" due to their contents, size or location, or because they are "subject to strict regulations, including regular inspections, under another program." 47 C.S.R. 62-2.4. Specifically included within this

[1] The statute actually refers to the "zone of critical protection," which IOGA believes is a scrivener's error.

definition are hazardous waste tanks subject to regulation under the West Virginia Hazardous Waste Management Act, W. Va. Code §§ 22-18-1 *et seq.*, and 40 C.F.R. Part 264. SPCC tanks, by contrast, are omitted from the definition of Level 3 ASTs, despite the express recognition by the Legislature that these ASTs are subject to rigorous standards such that a waiver is warranted. Thus, inclusion of tanks covered by federal SPCC regulations within the "Level 3" category is fundamentally consistent with the Legislature's direction and the AST Act itself.

Moreover, ASTs used at oil and gas well sites during drilling and production are subject to oversight by WVDEP's Office of Oil and Gas ("OOG") and are subject to the regulatory requirements of 35 C.S.R. 1, 35 C.S.R. 4 and 35 C.S.R. 8, which include (a) inspections by OOG inspectors, (b) routine inspections by the owner or operator, (c) written annual inspection reports submitted to OOG, (d) and secondary containment and spill prevention requirements, which include the following mandates:

- Use of one of the following preventative systems or its equivalent, at a minimum, to prevent discharged oil or other pollutants from reaching waters of the state:
    - Dikes, berms, or retaining wall sufficiently impervious to contain spilled oil or other pollutants
    - Curbing
    - Culverting, gutters or other drainage system
    - Weirs, booms or other barriers
    - Spill diversion ponds
    - Retention ponds
    - Sorbent materials
- Inspection of diked areas prior to the drainage of tank batteries
- Compatibility of tank material and construction with the material stored and conditions of storage
- Secondary containment for the entire contents of the largest single tank if feasible, or alternative systems for tank battery and central treatment plant installations;
- Visual examination of tanks containing oil or other pollutants by a competent person as to their condition and need for maintenance on a scheduled periodic basis, including examination of the foundation and supports of tanks above the surface of the ground
- Fail-safe engineering of tank battery installations
- Periodic examination on a scheduled basis of all aboveground valves and pipelines

See W. Va. Code R. § 35-1-7. Therefore, IOGA urges WVDEP to include within "Level 3" those ASTs utilized in oil and gas operations, unless located within a zone of critical concern.

C. The Definition of "Level 1 AST" Should Be Modified

"Level 1 AST" is defined to include, among other things, an AST that contains substances defined as a "hazardous substance" in Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601(14). 47 C.S.R. 62-2.2.b. As currently drafted, therefore, an AST containing even trace or *de minimis* concentrations of a CERCLA hazardous substance ostensibly would fall within the definition of

a Level 1 AST, triggering the highest level of scrutiny under the Interpretive Rule. While IOGA is confident that this was not the agency's intention based on representations made at the October 1, 2014 working meeting and elsewhere, the plain language of the Interpretive Rule nevertheless is wholly unqualified. Accordingly, IOGA recommends that WVDEP revise the definition of "Level 1 AST" in the Interpretive Rule by clarifying that only if the AST contains **primarily** a listed hazardous substance will it be categorized as a Level 1 AST.

D. The Definition of "Level 2 AST" Should Be Clarified

"Level 2" is intended to function as the "catch all" category for those ASTs that do not fall within the definitions of "Level 1 AST" or "Level 3 AST." As currently drafted, however, the definition of "Level 2 AST" arguably is broader than this. Specifically, "Level 2 AST" is defined as "an AST that is determined by the Secretary to have the potential for lesser risk of harm to public health or the environment than a Level 1 AST due to its contents, size or location (i.e., an AST located in an isolated area with respect to public water systems, waters of the State or populated locales), **or** an AST that does not qualify as either a Level 1 AST or a Level 3 AST." 47 C.S.R. 62-2.3 (emphasis supplied). For purposes of clarity, IOGA recommends that this definition be revised as follows:

> "Level 2 AST" means an AST that ~~is determined by the Secretary to have the potential for lesser risk of harm to public health or the environment than a Level 1 AST due to its contents, size or location (i.e., an AST located in an isolated area with respect to public water systems, waters of the State or populated locales), or an AST that~~ does not qualify as either a Level 1 AST or a Level 3 AST. Thesc ASTs have been determined by the Secretary to have the potential for lesser risk of harm to public health or the environment than a Level 1 AST due to its contents, size or location (i.e., an AST located in an isolated area with respect to public water systems, waters of the State or populated locales).

E. The New "Wellhead Protection Area" Concept Should be Deleted

Also included in the definition of "Level 1 AST" is any tank located within a "wellhead protection area." 47 C.S.R. 62-2.2.a. This term appeared for the first time in the draft Interpretive Rule and is found nowhere in the AST Act (or elsewhere in Senate Bill 373), and introduces further confusion and uncertainty into this new regulatory program. West Virginia law already requires reporting of releases of contaminants to the environment, and remediation of such releases. Further, the AST Act, and presumably the regulations implementing the same, imposes requirements for release reporting and corrective action plans intended to prevent contamination of public surface water supply sources. Public groundwater supply sources from wells (excluding those influenced by surface waters) are simply not susceptible to contamination from AST releases, except over a period of months or years rather than hours, which is the basis for determining the extent of a zone of critical concern. WVDEP has not identified any causal relationship between releases from ASTs and contamination of "public groundwater supply sources." There is simply no rational basis for regulating ASTs in relationship to public groundwater supply sources or wellhead protection areas. IOGA urges WVDEP to delete the term "wellhead protection area" from the definition of Level 1 AST. The Secretary would

continue to have the discretion to designate a tank as a Level 1 AST upon a determination that the AST "exhibits a potential for high risk of harm to public health or the environment." 47 C.S.R. 62-2.2.d. Moreover, to the extent that the WVDEP has advised any AST owner or operator that an AST is located in a ZCC solely because it is located in a wellhead protection area, the WVDEP should immediately reverse and withdraw such a determination.

F. Use of OOG Form OP-13 ("Operator's Annual Inspection Form") Should Be Approved as Fulfilling the Industry Standard Requirement

The Interpretive Rule requires that the initial inspection for Level 2 and Level 3 ASTs "shall be conducted in accordance with industry standards appropriate to the tank or tank facility (*see*, industry standards in Appendix A) and shall, at a minimum, conform to the requirements set forth in Appendix B." 47 C.S.R. 62-3.3. Appendix A simply lists 11 institutes, societies and associations that publish various statements and recommendations, but does not identify the "industry standards" that apply to particular categories of ASTs. Moreover, the "industry standards" are not publicly available. For example, the Steel Tank Institute's SP001 Standard for the Inspection of Aboveground Storage Tanks (Fifth Edition) costs $170.00 to download and review for applicability. Likewise the cost to purchase the many API standards ranges from $59 for Dismantling and Disposing of Steel from Aboveground Leaded Gasoline Storage Tanks to $475 for Welded Tanks for Oil Storage, Twelfth Edition.

IOGA urges WVDEP to expressly authorize oil and gas operators to inspect and certify ASTs in accordance with the requirements of 35 C.S.R. 1, and 35 C.S.R. 4 or 35 C.S.R. 8, which annual inspection and certification is already required to be submitted to OOG by March 31, 2015. This inspection and certification on Form OP-13, titled "Operator's Annual Inspection Form," should be approved as fulfilling the industry standard requirement of the Interpretive Rule if submitted to WVDEP by the January 1, 2015 deadline.

If Form OP-13 is not approved for use by oil and gas AST owners and operators, a reasonable form of certification expressly identifying the elements subject to certification should be included as part of the Interpretive Rule.

G. Appendix B Should Be Modified

IOGA requests that Appendix B be clarified to require certification for AST design only "if known to owner," as design specifications may not be known to the owner for Level 2 ASTs. Similarly, the recordkeeping certification should be qualified and limited to "the records available, if any," because recordkeeping was not previously required—and will not be required until an emergency or legislative rule becomes effective.

H. Mobile Tanks Should Be Exempt from Compliance With the Interpretive Rule

By definition, a mobile tank is not an AST for purposes of the AST Act until it "remains in one location on a continuous basis for sixty or more days." W. Va. Code § 22-30-3(1). It became unlawful to "operate or use" an unregistered AST as of October 1, 2014, *see* W. Va. Code § 22-30-4(g), and therefore this is the date from which the 60-day calculation should be

made concerning whether a mobile tank constitutes an AST or not. A mobile tank should not be considered an AST until November 29, 2014, assuming it has remained in one location on a continuous basis during that entire period. Requiring mobile tanks to submit SPR plans by December 3, 2014 and tank inspections and certifications by January 1, 2015 imposes an unfair and unreasonable burden on mobile tank owners and operators. Accordingly, the owners and operators of mobile tanks should be exempt from the requirements of the Interpretive Rule, including the statutory deadlines in order to provide a reasonable amount of time to comply with the AST Act following a determination that a mobile tank has become a regulated "aboveground storage tank" under the AST Act.

I. Conclusion

IOGA appreciates the opportunity to provide these comments to WVDEP and requests that they be given due consideration.

Respectfully Submitted,

INDEPENDENT OIL AND GAS ASSOCIATION
OF WEST VIRGINIA, INC.

October 9, 2014

6558067

Jefferson County Public Service District

October 8, 2014

Scott Mandirola, Director
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: Potable water storage tank proposed Interpretive Rule

Dear Mr. Mandirola:

Jefferson County Public Service District, as a member of The Water Utility Committee of the WV AWWA, supports the proposed Interpretive Rule and appreciates the efforts of WV DEP in drafting and proposing the Rule. We believe that in proposing to rank potable water storage tanks as Level 3, the DEP has found the proper balance between the requirements of SB 373 and the recognition that public water systems pose little threat to the water sources which we hold so dear.

We appreciate that with the Level 3 designation, DEP has reasonably revised the requirements on public water supply systems for tank inspections and spill prevention response plans.

However, we are concerned that an apparent conflict within the language of the Interpretive Rule may cause confusion, and could potentially undermine the DEP's intent for water storage tanks to be ranked as Level 3.

Section 47-62-2.2.c defines a Level 1 Tank as: "An AST with a capacity of 50,000 gallons or more, regardless of location or contents..." This language arguably conflicts with Section 47-62-2.4 which defines a Level 3 tank as "...an AST that is determined by the Secretary to have the potential for low risk of harm to public health or the environment due to its contents, size or location, or because the AST is subject to strict regulations, including regular inspections, under another program (i.e., AST's containing potable water, filtered surface water...."

Read strictly, the effect of 47-62-2.2.c could be interpreted that only potable water tanks under 50,000 gallons would be considered Level 3.

DEP has already issued an informal email addressing this apparent conflict, and clarifying that "Potable water tanks are level 3 ASTs regardless of size". We respectfully suggest that the proposed Interpretive Rule be modified to include this important clarification.

Sincerely,

Susanne Lawton
General Manager

340 Edmond Road, Suite A · Kearneysville, WV 25430 · 304-725-4647 · Fax: 304-725-5976 · www.jcpsd.com

Ombler, Tonya K

From: Jeffrey Knepper <j.knepper@palmertongroup.com>
Sent: Wednesday, October 08, 2014 8:37 AM
To: WV DEP Tank Rules
Subject: Emergency and Interpretive Rule

My name is Jeff Knepper and I was formerly with the WVDEP in the Division of Water and Waste and Mining and Reclamation. I recently attended an Above Ground Storage Tank certification class provided by the Steel Tank Institute (SP001). This is one of the certifications accepted by the rules to inspect ASTs. After taking the week long class I feel confident that I can properly inspect an AST. A person registered as a W.V. Professional Engineer is not good enough to inspect an AST. There are too many rules and regulations separate from the general knowledge of a Professional Engineer. This class from the Steel Tank Institute or the American Petroleum Institute are vital to properly inspect an AST.

Jeffrey Knepper, C. P.G.*
Senior Project Manager

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www.palmertongroup.com

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o: 315-800-1800 | c: 412-302-5085
j.knepper@palmertongroup.com | www.gza.com

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Camden Operations Office - Telephone (304)675-8940, Fax (304)675-6403

October 7, 2014

WV Department of Environmental Protection – Public Information Office
AST Interpretative Rule Comments
601 57th Street SE
Charleston, WV 25304

RE: Proposed Interpretative Rule, Above Ground Storage Tank Program

Dear Committee:

Here below is a quick overview of the language in the interpretative rule:

Section 1.5 - Applicability. Public Water suppliers need to be exempted. Why?

Section 1.6 – If a storage tank contains public drinking water then it does not pose a risk: to the public water supply [water shed], health of citizens, or economy of the State. The risks to the environment are erosion [if the spill is catastrophic] and wildlife. The possibility of catastrophic tank failure is absurdly small so erosion of nearby structures is not a concern. Why? A catastrophic failure would likely be preceded by a large leak. This large leak would be detected by the utility because the tank would not hold system pressure as it dropped in volume. A threat to wildlife exists if the leak is large enough and the tank near enough to waterways that the Cl2 in the water in the tank enters the waterway in enough concentration to affect wildlife health. This is unlikely as the Cl2 would be consumed before it reaches a waterway. Most water tanks are remotely located to obtain enough elevation to supply a large area and this usually puts them large distances from any substantial waterway.

Section 2.2 "Level 1 AST" says potable water is not considered in this section. This exemption is also conveyed to levels 2 and 3. This infers that potable water carries no risk. During registration we were informed to use Level 0, which is not even listed here. Having said this, Section 2.2.c suggests that potable water will be considered if volume is greater than 50,000 gallons which appears to be contradictory. And, section 2.4 hints that potable water operators already have some sort of inspection criteria levied by a regulatory agency.

Section 3. Initial Inspection and Certification speaks to levels 1 through 3, again level 0. This infers that the owner can do the inspection. But it also speaks to certification. If the State insists that the owner/operator of potable water ASTs perform inspection, will they provide the training? AST owners already perform inspections so it is a question of degree of certification and process [what is inspected, what is being looking for].

Section 4. Initial Submission of Spill Prevention Response Plans has under section 4.4 the language that public water storage tank operators are included under Level 3. Again it appears contradictory.

Based upon this initial look at the specific language it is suggested that wordsmithing be accomplished to eliminate areas of ambiguity. It just seems confusing.

Considering all of this it becomes apparent [at least on the surface] that WV DHHR/OES [BPH] and the WV PSC might not have been consulted. In speaking to BPH I got that impression. I have not asked the PSC. Why is this important? WV BPH oversees water utilities through their Sanitary Inspection program which can involve site visits to storage tanks, as well as the Backflow Prevention program with licensing and water system operator licensing. Would they not be the logical choice to enforce licensing of water storage tanks inspectors versus requiring an engineering firm or storage tank installer with all of the associated cost? Yes, cost is a concern and the PSC tightly controls the rates that water utilities can charge their customers. They also have an ancillary involvement is what maintenance reserves water utilities can hold, meaning that some utilities might have a difficult time paying for this work.

Thanks for your consideration.

Very truly yours
Mason County PSD

Randy Grinstead, Manager

KB

McAteer & Associates

PLLC
-Attorneys-at-Law-

Post Office Box 1050
132 West German Street
Shepherdstown, West Virginia 25443

J. Davitt McAteer, Esquire
mcateeresq@aol.com

Phone: (304) 876-9447
Facsimile: (304) 876-3102

RECEIVED
SEP 13 2014

September 11, 2014

VIA CERTIFIED MAIL/ RETURN RECEIPT REQUESTED

Randy Huffman
Cabinet Secretary
West Virginia Department of
Environmental Protection
601 57 Street, S.E.
Charleston, WV 25304

Dear Secretary Huffman:

I represent Lyle C. ("Cam") Tabb, III, of Jefferson County. Mr. Tabb operates the Lyle C. Tabb Farm in Jefferson County. We write to challenge the application of the Aboveground Storage Tank Act ("the Act") at W.Va. Code §22-30-6 and the requirements for submitting spill prevention response plans set forth in the Act at W.Va. Code §22-30-6.

Mr. Tabb is or may be an owner or operator of aboveground storage tanks associated with his farming operations.

The Aboveground Storage Tank Act Senate Bill 373 was approved by the 2014 West Virginia Legislature and signed into law by Governor Earl Ray Tomblin on April 1, 2014 and took effect June 6, 2014. The bill requires that an inventory and registration of aboveground storage tanks be completed by October 1, 2014, nineteen days from today. On Tuesday, September 9, 2014, Governor Tomblin's administration officials released a temporary rule entitled an Interpretive Rule which "provides guidance and clarification" for complying with the initial inspection and certification requirements set forth in the Act.

DEP officials are quoted in the Charleston Gazette saying that they hoped the "Interpretive Rule" would give tank owners and operators the information they need to complete mandatory inspection and safety certification required by the "tight deadlines" lawmakers created in Senate Bill 373 adopted in the aftermath of the Freedom Industries spill.

Let us be perfectly clear. Mr. Tabb whole heartedly endorses the concept of and the purpose behind the Aboveground Storage Tank Act. The tragic chemical spill which so negatively impacted the lives of more than a hundred thousand fellow West Virginian's needed to be addressed. The action of the legislators and the Governor to address this shortcoming are to be applauded, however the Act, as currently written interpreted is illogical, overly broad and bound to result in unintended consequences.

The issuance of the Interpretative Rule on September 9th was a step in the right direction, but did not address all the issues, especially those which the short time constraints cause.

We therefore are requesting a further Interpretive guidance which clarifies the following questions related to registration requirements and civil fee and penalties.

As you know, the Interpretive Rule was issued just 21 days before the Act's registration deadline of October 1, 2014. However the Interpretative Rule is silent on the registration Requirement (W.Va. Code §22-30-4) yet there is not an interpretation of what the Secretary's requirements for the registration and inventory will be. Notwithstanding the fact that these requirements are vague and unclear in the Act itself.

Further, the Interpretative Rules are flawed because the DEP scheduled the required public hearing and comment period for October 9th, eight days after the October 1, 2014 requirement that tanks must be registered (W.Va. Code §20.3-4). This gap of time invalidates the public hearing and comment period, provides insufficient notice and calls into question the requirement of the October 1, 2014 deadline. Moreover, the public comment and hearing announced in the Interpretative Rule are insufficient and inadequate to meet the requirement of W.Va. Code §29A-3-5 Notice of Proposed Rulemaking, as well as §29A-3-7, Notice of Hearing Requirements of 30 days and §29A-3-6, Notice and hearing as a condition precedent to the final approval of the agency.

Furthermore, the Interpretative Rule and the belated public hearing and comment period also contradict the provisions of §20-30-4 relating to fees and fines under this provision. Section 22-30-4(g) makes it unlawful for any owner or operator to operate or use an aboveground storage tank subject to this article which has not been properly registered or for which any applicable registration fee has not been paid, yet the Secretary has not established a registration fee and has not been clear as to which above ground storage tanks require registration.

Therefore, because the requirement of the Interpretative Rule, public comment and public hearings will not be met by October 1st there are procedural deficiencies. In addition, the Secretary's failure to establish a registration fee schedule renders the requirements of the Act arbitrary and capricious.

Therefore, we are requesting that the Secretary's Interpret the Act to waive the application of any penalty until after the public hearing comment period has been held.

We further request that the application of any civil and criminal penalties under §22-30-17 be delayed until the public hearing and comment period requirements be complied with and fees have been established or rejected.

The intent of the Legislature in adopting this Act is without question correct, however in the rush to move through the legislative procedure, possible oversights were made in adopting dates and times for compliance. Ideally and as happens in so many other instances, a Special Session of the legislature could be called to rectify these errors, however that appears not to be the case here, Governor Tomblin has announced that he will not call a Special Session of the legislature.

Therefore, by virtue of the overlapping time requirements and the DEPs inadequate effort to interpret the rule, individuals who own or operate Aboveground Storage Tanks are placed in the untenable position of being forced to attempt to comply with unclear, arbitrary and capricious requirements or face the potential consequences of thousands of dollars in civil or criminal penalties for operating low level, non-hazardous material tanks which pose no risk to the public or the environment. This is obviously not what the legislature desired not what the administration wants, but it is the reality, for the above reasons, we hereby request the legislature and executive branch act, so as to avoid the need to seek judicial remedies as the current Act and Interpretative Rules are both substantively and procedurally defective.

Sincerely,

J. Davitt McAteer

JDM/dr
cc: Lyle C. Tabb, III

Ombler, Tonya K

From: Dave Mills <fineinteriortrim@gmail.com>
Sent: Tuesday, October 07, 2014 8:02 PM
To: WV DEP Tank Rules
Subject: AST

Sirs,

In the Draft Legislative Rule presented Oct 1 at the Civic Center there was no exemption for movable tanks. It was the sense of the document that these tanks be included and that they be inspected and the approved status would follow the tank. This was clearly stated. To exempt these tanks is a major and unacceptable change. These tanks need to be registered and inspected particularly because the Industry Proprietary Secrets situation precludes us from knowing just what kind of hazardous wastes they contain. You all have worked hard to produce a robust and detailed draft rule - please don't weaken it now.

Yours,
David s. Mills

Ombler, Tonya K

From: Dave Mills <fineinteriortrim@gmail.com>
Sent: Tuesday, October 07, 2014 9:11 PM
To: WV DEP Tank Rules
Subject: AST

Dear Sirs,

It has occurred to me that tanks onsite for less than 60 days ought to be covered under the AST Draft Law because the contents of many of them will be unknown to us because of the Industrial Trades Secrets situation. They may well contain hazardous liquids and should be assumed to contain such liquids.

Yours,
David S. Mills

278 Greenbag Road • Post Office Box 852 • Morgantown, WV 26507-0852 • 304-292-8443 • Fax 304-292-1526

www.mub.org

October 7, 2014

West Virginia Department
of Environmental Protection
Public Information Office
AST Interpretive Rule Comments
601 57th Street, SE
Charleston, WV 25304

The following comments are provided in the name of the Morgantown Utility Board (MUB).

Where the term Public Water System (PWS), or any variation thereof, is used below, it refers to operators of potable water utilities of all kinds, regardless of whether the utility is publicly or privately owned, and regardless of whether that utility treats/produces its own water or purchases it from another water utility.

The MUB supports the proposed Interpretive Rule and appreciates the efforts of WV DEP in drafting and proposing the Rule. We believe that in proposing to rank potable water storage tanks as Level 3, the DEP has found the proper balance between the requirements of SB 373 and the recognition that PWS's pose little threat to the water sources which we hold so dear.

We appreciate that, with the Level 3 designation, DEP has proposed reasonable requirements applying to tank inspections and spill prevention response plans for facilities owned and operated by PWS's.

However, we are concerned that an apparent conflict within the language of the Interpretive Rule may cause confusion, and could potentially undermine the DEP's intent for water storage tanks to be ranked as Level 3.

Section 47-62-2.2.c defines a Level 1 Tank as: "An AST with a capacity of 50,000 gallons or more, regardless of location or contents..." This language arguably conflicts with Section 47-62-2.4 which defines a Level 3 tank as "...an AST that is determined by the Secretary to have the potential for low risk of harm to public health or the environment due to its contents, size or location, or because the AST is subject to strict regulations, including regular inspections, under another program (i.e., AST's containing potable water, filtered surface water...."

Read strictly, the effect of 47-62-2.2.c could be interpreted that only potable water tanks under 50,000 gallons would be considered Level 3.

DEP has already issued an informal email addressing this apparent conflict, and clarifying that "Potable water tanks are level 3 ASTs regardless of size".

We respectfully suggest confirmation of the informal clarification, by enacting the following change to **§47-62-2(2.2)**:

> 2.2. "Level 1 AST" means an AST that is determined by the Secretary to have the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264. Except as provided in Sections 2.3 and 2.4, an ~~An~~ AST that meets any of the following criteria is a Level 1 AST:

Thank you for your important work, and for considering these comments.

Respectfully,

MORGANTOWN UTILITY BOARD

Timothy L. Ball, P.E.
General Manager

Comments on Proposed AST Interpretive Rule
10/9/2014

The 2014 Senate Bill 373 for the above ground storage tanks is a good start to protecting the waters of the State that are sources for public drinking water. However, there is always room for improvement. I only have one suggestion.

> Currently calls to the DEP Spill Line are being shared between the state agencies, but unfortunately there is sometimes a lag time in getting the information about potential water contamination to affected public water systems or suppliers. This can be detrimental to the health of the public. I recommend that DEP include in the permit process that the permittees include notifying public water systems during their initial notification of a spill, and also include the public water systems for updates of additional information.

Incidents near public water intakes have occurred in the past, across the state, in which the information was slow to arrive to affected systems. As we saw in January of this year, water is the source of life for our residents and businesses. We must protect our watersheds because we all live downstream.

Another comment is that many chemicals stored in the AST may not be on the list of hazardous & toxic chemicals, but that does not negate the fact that these chemicals should not be ingested or absorbed through the skin. Please do not compromise the legislation any further.

Pam Nixon
906 Overlook Way
South Charleston, WV 25309
pamnixon@aol.com
304-546-7764

Ohio Valley Environmental Coalition
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Huntington, WV 25773-6753
www.ohvec.org
Ph. 304-522-0246
Fax 304-522-4079

October 9, 2014

Thank you for the opportunity to submit the following comments on the Interpretive Rule for SB 373. Directly after the January 9, 2014, Freedom Industries disastrous chemical spill into the Elk River contaminating the municipal water supply of 300,000 people, OVEC's staff went into near non-stop action for 2 ½ months following the event.

While we are not a service organization, we nevertheless provided drinking water and other critical supplies to people living in the more rural areas affected by so-called "spill." As a grassroots organization that in the past 15 years have served people in our southern mountain communities whose water supplies have been impacted by the disposal coal-cleaning chemicals like crude MCHM and other coal waste, we were compelled to come to their aid, like so many others.

OVEC submits the following comments on the Interpretive Rule for SB 373:

- First and foremost, OVEC believes that DEP should not delay public safety. Delay was a primary culprit of the West Virginia water crisis. We urge DEP to mandate applicable industries to meet all the current deadlines with no exceptions. Since June 2014, compliance guidance has been available. West Virginia's economy, our water and our health cannot afford another chemical disaster.

- OVEC supports WV DEP's active efforts to include and also consider public input into the development of these, worked to meet deadlines to prevent a delay in implementing public safety measures and has provided timely materials to assist tank owners with compliance.

- When classifying tanks as Level 1, OVEC urges DEP to use the most protective list of chemicals to protect our water—those in Section 2.35 of the emergency rule—instead of the list in the interpretive rule (the CERCLA list). OVEC supports Level 1 tank classification as outlined in the Emergency Rule. Classifications should be consistent in both the Interpretive and Emergency Rule.

- Food grade materials used in the fracking process should not be exempt from either the Interpretive Rule or the Emergency Rule

- OVEC supports the Secretary's ability to only reclassify tanks as Level 1. Currently the methods for designating tank levels differ in the Interpretive Rule and the Emergency Rule. For the sake of clarity, methods of classification should be consistent.

- OVEC urges the Secretary to begin the Level 1 classification process now that the registration period has ended, especially tanks located close to zones of critical concern, and especially including tanks storing unknown chemicals where little is known about them, like crude MCHM, even if they are below the 50,000 gallon threshold.

- OVEC asserts that this interpretive rule is a compromise resulting from significant public input and stakeholder meetings. We are concerned that above ground tank inspections will not be as thorough as many in the public would like them to be. For example, some tanks are already exempted from the permitting process including process vessels, temporary tanks and mobile tanks. This includes a number of tanks throughout Kanawha Valley and throughout areas where fracking occurs. We encourage greater scrutiny of all these types of vessels.

If you are old enough, you may remember *The Tragedy of the Commons*, an essay by Garrett Hardin, who, in the late 60s puts forth his economic theory in which a shared resource by individuals, acting independently according to self-interest, is contrary to the group's long-term best interests, in this case, Freedom Industries contaminating West Virginia's municipal water supply.

I leave you with a portion of a 17th Century poem written during the enclosure movement in England where farmers were fenced out of the common grazing lands:

The law locks up the man or woman
Who steals the goose off the common
But leaves the greater villain loose
Who steals the common from the goose.

Submitted for OVEC by Vivian Stockman, Project Coordinator

Ombler, Tonya K

From: WV DEP Tank Rules
Sent: Friday, October 10, 2014 10:25 AM
To: Ombler, Tonya K
Subject: FW: Comments

It's not clear if this is for the interpretive rule or the emergency rule

From: OliverFuels@aol.com [mailto:OliverFuels@aol.com]
Sent: Tuesday, September 30, 2014 2:46 PM
To: WV DEP Tank Rules
Subject: Comments

Temporary jobsite storage tanks/field tanks:

1. If a contractor comes into WV to start work and the supplier discovers that they have not yet registered their 1320+ gallon tank with the State of WV, how long will it take the WVDEP to show it as registered before the supplier can fill the tank? Will the contractor have to wait around with their staff for a week? 3 days? What if another supplier goes ahead and fills the tank - knocking the original supplier, who tried to follow the law, out of a sale. Will there be fines for both the tank owner and supplier or will it be ignored as it is most of the time with the USTs.
2. Please be specific on what is required for Level 2 & 3 tanks in regards to leak detection monitoring systems and overspill alarms. Also what about the jobsite tanks? This will be expensive, especially for tanks already in containment with SPCC plans in place. Who is going to hear the alarm on weekends and holidays when the business or job is shut down? Another enormous expense for Level 2&3 tanks that many cannot afford.
3. The reporting process for temporary jobsite tanks moving from job to job needs to be simple. Reporting their locations, in or out of service needs to be simple.
4. Unfair to treat suppliers to these tanks as police, penalizing them for not doing the State's job of checking for tank registration & etc.
5. Why just the ASTs? What about the cemetaries with all the decaying bodies full of formaldahyde, a known cancer causing agent? Why aren't the same leak detection alarms put in place there? If there is so much concern about the water, why stop with the tanks?
6. Temporary jobsite/field tanks: Who should have the SPCC here? The owner who has no control or the operator? An SPCC per site? Won't that be terribly expensive for the contractors? They may only be there a few months. By the time the P.E. gets the SPCC in order the contractor could be done and ready to move out. Also a great expense for contractors per job.
7. Extend the temporary jobsite tank timeline from 60 days to 6 months - 1 year.
8. Letting an owner of Level 2 &3 certifiy their tanks vs. a licensed PE is a good idea. This expense will shut down many businesses in WV and cost jobs and tax dollars.
9

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PARKERSBURG UTILITY BOARD

125 Nineteenth Street
Parkersburg, West Virginia 26101-2596

Telephone 304–424–8535
Fax 304–485–3802

October 8, 2014

West Virginia Department of Environmental Protection
Public Information Office
AST Interpretive Rule Comments
601 57th Street, SE
Charleston, WV 25304

The Parkersburg Utility Board wishes to express our support for the proposed Interpretive Rule and appreciates the efforts of WV DEP in drafting and proposing the Rule. We truly believe that in proposing to rank potable water storage tanks as Level 3, the DEP has found the proper balance between the requirements of SB 373 and the recognition that water system's pose little threat to the water sources which are necessary for our daily functions.

We appreciate that, with the Level 3 designation, DEP has proposed reasonable requirements applying to tank inspections and spill prevention response plans for facilities owned and operated by either public or private entities.

However, we are concerned that an apparent conflict within the language of the Interpretive Rule may cause confusion, and potentially undermine the DEP's intent for water storage tanks to be ranked as Level 3.

Section 47-62-2.2.c defines a Level 1 Tank as "An AST with a capacity of 50,000 gallons or more, regardless of location or contents....." This language arguably conflicts with Section 47-62-2.4 which defines a Level 3 tank as ".... An AST that is determined by the Secretary to have the potential for low risk of harm to public health or the environment due to its contents, size or location, or because the AST is subject to strict regulations, including regular inspections, under another program (i.e., AST's containing potable water, filtered surface water...."

Taken literally, the effect of 47-62-2.2.c would mean that only potable water tanks under 50,000 gallons would be considered Level 3.

DEP has already issued an informal email addressing this apparent conflict, and clarifying that "Potable water tanks are Level 3 AST's regardless of size".

Therefore, we respectfully request confirmation of the informal clarification, by enacting the following change to **§47-62-2(2.2):**

> 2.2. "Level 1 AST" means an AST that is determined by the Secretary to have the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fore or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264. Except as provided in Sections 2.3 and 2.4 an AST meets any of the following criteria is a Level 1 AST:

PUB appreciates the agencies tiring efforts in dealing with this significant issue, and for considering these comments. If you have any questions or wish to discuss this matter further please feel free to contact me at your earliest convenience.

Respectfully,
Parkersburg Utility Board

Eric Bennett
General Manager

cc:
Parkersburg Utility Board
George Zivkovich, Counsel
Eric Bumgardner, Assistant Manager

October 9, 2014

West Virginia Department of Environmental Protection
Public Information Office
AST Interpretive Rule Comments
601 57th St. SE
Charleston, WV 25304

RE: Aboveground Storage Tank Program Interpretive Rule

Dear Secretary Huffman,

For your consideration on the final Aboveground Storage Tank Program Interpretive Rule, People Concerned About Chemical Safety offers the following comments recognizing that the most recent version of the Interpretive Rule provided to the public, with exception of the tank classification, was a true compromise that came to be through significant public input and stakeholder meetings. SB373, perhaps as an unintended consequence, already exempts a number of tanks that pose significant risk to human and environmental health including process vessels which make up a number of the tanks in the Kanawha Valley and elsewhere that over the years have caused numerous worker and community injuries and fatalities. As such, we urge you not to weaken the rules any further.

TANK CLASSIFICATION

1. Tank classification as defined by the Emergency Rule is what is most protective of water and was most agreeable to members of citizen groups who attended the August 29th stakeholder meeting. Section 1.5.c.4 of the Emergency Rule provides the Secretary with the discretion to designate a change in classification at any level, not just Level 1, assigned for an AST system in order to best protect public health and the environment. We support this discretion and encourage DEP to consider including this language in the Interpretive Rule to provide consistency for tank owners.

2. Just as in the case of MCHM, the public is unfortunately all too clear that chemical classification does not always equate risk, and that seemingly benign substances may not always be quite so benign. Milk and maple syrup are obviously benign and intended for human consumption. We don't believe this bill was intended to penalize food producers or that it is fair that they would be penalized for the risks that other food-grade classified tank owners may pose. To clarify our position, we urge DEP not to allow exemptions for food-grade materials that may cause human or environmental harm -- specifically, we urge you not to exempt food-grade materials used in the fracking process without significant scientific data illustrating public and environmental safety. Additionally, we urge you to reconsider the risk of exempting chemically treated non-contact cooling water in both rules without

significant scientific data illustrating human health and environmental safety. If 50,000 gallons of either material released 1.5 miles upstream of our drinking water intake, would we be in a similar situation as we were on January 9th?

3. As tanks have now registered to meet the October 1st deadline, we encourage you to immediately begin the process of Level 1 tank classification. In doing so, close consideration should be taken of:
    a. tanks within a close perimeter of Zones of Critical Concern;
    b. tanks holding substances identified by OSHA as hazardous (such as in the case of MCHM);
    c. tanks holding substances that have not undergone sufficient testing to determine human or environmental health impact.
    d. Technicality: Interpretive Rule Section 4.3
        a. 4.3 of the interpretative rule be revised so that "Spill Prevention Plans pursuant to 35 CSR 1 or" and "applicable" be deleted.

Now that the water no longer smells like licorice, many people resume daily activities. But most people who experienced this event will never forget the reason SB373 was passed unanimously though both houses with support from the Governor and public at-large. That is because a major chemical disaster occurred impeding our most basic human functions that no significant plans were in place to prevent.

We recognize the tremendous efforts undertaken by the DEP staff in the development and implementation of the Aboveground Storage Tank Program. This process has been challenging to say the least. DEP has worked diligently to assist tank owners with compliance. They have ensured deadlines are met to prevent a delay in implementing public safety measures. DEP's active engagement of the public on this hot button issue is appreciated and exemplifies the value of diverse points of view. For all of this we thank the DEP. Because our economy, our water and our health can't afford another hit like the January 9th chemical disaster, we encourage you to keep up the good work!

Sincerely,

Maya Nye, Executive Director
People Concerned About Chemical Safety
179 Summers Street, Suite 232
Charleston, WV 25301

Ombler, Tonya K

From: Leslie Pierce <peeweepierce@hotmail.com>
Sent: Monday, September 22, 2014 2:30 PM
To: WV DEP Tank Rules
Subject: Proposed tank laws and Interpretive rule

If an owner/operator is allowed to certify their own tanks (Tier 3) without DEP verifying that they are qualified/certified to do so is not in the best interest of the public.

Comments on
Emergency AST Rule
Department of Environmental Protection
Division of Water and Waste Management

I am Alex Ralston. I have been in the petroleum equipment business for 38 years and prior to that was employed by Exxon Corp. for 10 years. I am a certified STI SP001 inspector and have been performing aboveground tank inspections for over 10 years. I have been a NACE certified Cathodic Protection Tester for over 10 years.

I have been teaching students in West Virginia how to properly install aboveground storage tanks through my training course, "*How to Install Shop Fabricated Aboveground Storage Tanks*", for over 12 years. I am also the author of an article, "*Inspecting Chemical Tanks*" published in the Steel Tank Institute publication "*Tank Talk*"

1. Dividing the tanks into three levels is a good idea. I believe that this is a good approach to regulating the aboveground tank population.

2. The rules governing the regulation of aboveground storage tanks in West Virginia should have included in the rule a minimum requirement for the inspection of the following: Spill Containment, Overfill Prevention, Leak Detection, Corrosion Protection, and Secondary Containment. These items are the minimum items to be regulated and relate to all aboveground storage tanks, regardless of the contents.

3. The population of aboveground tanks is huge. There is no way that any state can inspect every aboveground storage tank in the state without vastly expanding the number of inspectors. The state should only regulate tanks that may pose a risk to the public health or the environment. The aboveground tanks that pose little or no risk to the public or the environment should not be regulated. Level 3 tanks should not be regulated.

   Tanks that contain liquids that pose no hazard or harm to the public health or the environment should <u>not be regulated</u>. This would include such products as: potable drinking water, filtered surface water, de-mineralized water, water used for fire emergency purpose, non-

contact cooling water and liquids intended for human or animal consumption. Tanks that are part of vehicles, machinery or equipment should not be regulated.

4. A formal initial inspection of each regulated tank, regardless of age, by a qualified person should be mandatory, however, annual inspections should be allowed to be performed by the owner or any person designated by the owner or operator, provided all deficiencies found in the initial inspection have been corrected.

5. There is no engineering discipline for inspecting aboveground tanks, yet the senate rule states that a professional engineer is qualified to inspect these regulated tanks. The rule further states that an individual may work under the direct supervision of a professional engineer.

   If there is no engineering discipline for inspecting aboveground storage tanks, why are these individuals qualified to make inspections of the regulated tanks? What additional training on inspecting aboveground tanks is going to be required of a PE? The STI and API certifications are specifically for aboveground storage tanks but simply having a PE, without any further training, is not a qualification to inspect these regulated tanks.

6. The Fiberglass Tank and Pipe Institute has a recommended practice for the in-service inspection of aboveground tanks. This document should be referenced as the standard for inspecting aboveground fiberglass tanks.

7. I am not aware of any industry standard for inspecting poly tanks. What standard is going to be used for these tanks?

8. Metal tanks that are in direct contact with ground should require an initial internal inspection, or a leak test performed to an industry standard. An example of this would be a vertical metal tank that is resting directly on the ground. Tanks that are not in direct contact with ground or tanks resting on a concrete slab would be exempt for the internal inspection requirement.

9. 1.6 l add: Fiberglass Tank and Pipe Institute, 14323 Heatherfield, Houston, Texas 77079-7407

10. Section 5.7 a ... At a minimum, the following information shall be labeled/marked on or near all ASTs that have not undergone permanent closure.

The information can be on a sign near the tank and not necessarily on the tank itself.

5.7 a 6 The CAS number on chemical tanks.

11. 5.2a Secondary Containment

I do not believe that requiring a visual inspection of the secondary containment every 72 hours is necessary or realistic. Requiring a visual inspection once every 3 days is an unnecessary burden on the tank owner. A visual inspection would only identify damage or a breach in the secondary containment. I believe that a monthly inspection is more realistic.

I am of the opinion that the requirement in the groundwater law that the secondary containment be able to hold a liquid for a minimum of 72 hours relates to the permeability of the material the secondary containment is constructed of and not the integrity of the secondary containment. If my opinion is correct, inspecting the secondary containment every 72 hours will not identify any permeability issues only structural issues.

This issue would appear to address open dikes. In my opinion, secondary containment systems such as double bottom or double wall tanks should not fall under this rule and should be inspected either electronically or manually monthly.

12. 5.4 Internal Inspections

It is not clear if the rule is requiring an internal inspection on every tank or which tanks require internal inspections and which tanks do not.

13. 5.4.a What about tanks that are not subject to STISP001 or API 653 standards?

What criteria are you going to use to determine if an internal inspection is required?

George Monk and Molly Schaffnit
199 Bronco Lane
Poca, WV 25159
gmonk@citynet.net

Comments for 47CSR62, Interpretative Rule

The comments which follow are for 47CSR62, an Interpretative Rule providing guidance and clarification for specific requirements pertaining to the Aboveground Storage Tank Act.

We appreciate the effort the DEP has put toward creating this rule and the draft Emergency Rule and their willingness to work with the various stakeholders.

Section 2 – Definitions.

This section delineates tanks into three separate levels (2.2 through 2.4). We believe the definitions provided in the draft Emergency Rule (draft Emergency Rule sections 2.35 through 2.37) are more protective and are presented in wording that is easier to understand. The definitions from the draft Emergency Rule should be substituted for those in the Interpretative Rule.

One of the criteria that elevates a tank to Level 1 status is the size of a tank. In both the Interpretative and draft Emergency Rule a tank that has a capacity of 50,000 or more gallons is a Level 1 tank. We support the DEP's choice of this size, would support a size smaller than 50,000 gallons, but would not support a change to a large size tank since that would be less protective.

Section 3 – Initial Inspection and Certification.

We support the criteria found in section 3 of the Interpretative Rule. We do not believe the Rule imposes a hardship on operators, especially for inspections of Level 2 and 3 tanks. The DEP has made it known for some time the necessity and the timeline for these inspections.

Section 4 – Initial Submission of Spill Prevention Response Plans.

There appears to be an exemption for the submission of Spill Prevention Response Plans for Level 2 tanks at oil and gas wells if a Groundwater Protection Plan has been submitted as part of the permitting process. We can accept that if

the GPP has actually been filed as part of the permitting process and is reproduced in the permit published on the Office of Oil and Gas' website.

There appears to be an error in section 4.3 where the Rule cites 35CSR1 as an instance where an operator is required to maintain on-site a Spill Prevention Plan. There is no such requirement in 35CSR1.[1] As worded, the text is unclear. We would revise the rule thusly:

> 4.3. The owner or operator of a Level 2 ASI who is required to maintain on-site ~~Spill Prevention Plans pursuant to 35 CSR 1 or~~ Spill Prevention, Control, and Countermeasures Plans pursuant to 40 C.F.R. § 112 may submit the ~~applicable~~ plan to the Secretary in lieu of the SPRP by December 3, 2014. The Secretary may request additional information, if necessary, in order to ensure that such plans conform with the requirements of W. Va. Code § 22-30-9. Alternatively, the owner or operator may submit a site specific SPRP that, at a minimum, conforms to the requirements set forth in Appendix C and in accordance with W. Va. Code § 22-30-9 by December 3, 2014.

We approve of the DEP's requirement that, in the case of SPCC Plans, these documents should be submitted to the DEP if the operator chooses to do so instead of submitting a Spill Prevention Response Plan. Our concern is that on-site records, even federally required records, are not found at typical oil and gas well sites when these sites fall within SPCC requirements. These records also have not been found, in our experience, in the Office of Oil and Gas' files, even for UIC Class 2D sites where there have been large tanks (e.g., the well next to Tupper's Creek in Kanawha County, 47-039-02210, where there is a 57,000 gallon tank).[2]

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[1] 35CSR1.9 does require an operator's submittal of a "Spill Prevention Plan" if a facility has had a spill of more than 1,000 gallons or two spills within 12 months into waters of the state. The Spill Prevention Plan in 35 CSR1.9 has the appearance of an enforcement apparatus. The plan as presented in the rule includes a description of the cause of the spill, a copy of the Spill Prevention, Control, and Countermeasures Plan which existed at the time of the spill(s), if required under federal law; and a description of "corrective actions and/or countermeasures taken". The plan is not required to be kept on site. The Interpretative Rule's Spill Prevention Response Plan as presented in Appendix C should be the minimal requirement for any facility experiencing a major spill.

[2] In the case of the Tupper's Creek UIC Class 2D well, we have been unable to find out details about the tank which is supposedly double-walled. SPCC requirements for double-walled tanks are particular but there is no way to determine compliance through study of the large file for this well at the Office of Oil and Gas.

WEST VIRGINIA
AMERICAN WATER

Jeffrey L. McIntyre
President
1600 Pennsylvania Avenue
Charleston, WV 25302
P 304-340-2000
F 304-340-2076
E Jeffrey.McIntyre@amwater.com

October 7, 2014

West Virginia Department of
Environmental Protection
Public Information Office
601 57th St., SE
Charleston, WV 25304

RE: Comments to Proposed Interpretive Rule, 47 CSR 62

Dear Sir or Madam:

West Virginia-American Water Company ("WVAW" or the "Company") has reviewed the proposed interpretive rule, 47 CSR 62, regarding the initial inspection, certification and spill prevention response plan requirements under West Virginia Code §§ 22-30-6 and 22-30-9, issued for comment by the West Virginia Department of Environmental Protection ("WVDEP") on September 9, 2014. The Company appreciates WVDEP's efforts to provide guidance to aboveground storage tank ("AST") owners and operators in advance of certain legislative deadlines and the implementation of a permanent rule and the opportunity to provide written comments to proposed interpretive rule.

WVAW supports the adoption of the proposed interpretative rule and offers only two comments for the WVDEP's consideration.

First, the Company believes the definition of "Level 1 AST" needs to be clarified to specifically exclude potable water tanks from the Level 1 designation regardless of size or location. As currently written, it is unclear whether a potable water tank that fits within the descriptions set forth in §§ 47-62-2.2.a and 47-62-2.2.c is exempt from the Level 1 designation.

The Company appreciates that the WVDEP has clarified the potable water tank exemption for tanks larger than 50,000 gallons in size in the draft emergency rule released for stakeholder comment, but believes that the clarification also needs to be made in this interpretative rule. The exemption should be further clarified to exempt potable water tanks in a zone of critical concern from the definition of "Level 1 AST." Based on the stakeholder meeting held by the WVDEP on October 1, 2014 to discuss the draft emergency rule, the Company believes this request is consistent with the WVDEP's intent to qualify all potable water tanks as Level 3 ASTs.

The Company's second comment relates to the potential disclosure of spill prevention response plans. WVAW believes that spill prevention response plans should be kept confidential and exempt from disclosure to the public in the event of a public request for such plans under the Freedom of Information Act ("FOIA"). FOIA provides for various exemptions related to response plans designed to prevent, mitigate or respond to terrorist attacks. Detailed and site specific response plans address how to handle and react to a spill, regardless of whether it is accidental or the result of a terrorist attack. Therefore, in the interest of public health and safety, it should be afforded the same protections afforded to response plans and similar records meant to address terrorist attacks. *See* WV Code §§ 29B-1-4(a)(9), 29B-1-4(a)(10) and 29B-1-4(a)(14).

More specifically, under the proposed emergency rule spill prevention response plans will be required to include drawings of the AST facility, including the location of "major facility structures, including all AST systems and buildings[,] . . . all drainage pipes and water outlests[, and] . . . all monitoring and/or observation wells." 47 CSR 63, §§ 5.6.c.4.B, 5.6.c.4.C and 5.6.c.4.D. Each of these facilities are used in the provision of water service and therefore, constitute "specific engineering plans and descriptions of existing public utility plants and equipment" that are exempt from public disclosure under WV Code § 29B-1-4(a)(17).

Again, the Company appreciates the opportunity to provide its comments to the WVDEP and looks forward to working with the WVDEP and other stakeholders to effective regulations.

Sincerely,

Jeffrey L. McIntyre

JLM:da

Comments on Interpretive Rule for SB 373

From WV Citizen Action Group, 1500 Dixie St, Charleston WV 25311; PH 304-346-5891

First we want to thank the WVDEP for including concerned citizens and citizen groups in the stakeholder discussions on this issue. DEP has worked hard to meet mandated deadlines to prevent a delay in implementing these public safety measures. WV DEP has also provided timely materials to assist tank owners with compliance.

The following is an outline of our comments:

1. **We support the interpretive rule maintaining important deadlines.**
   - Public safety cannot be delayed. We support initial spill plans and inspections completed by the deadlines set forth in SB373.
   - We acknowledge that the interpretive rule is a compromise that provides flexibility for tank owners to efficiently meet initial deadlines.
   - Compliance guidance has been available to tank owners since June 2014.
   - Our economy, our water and our health can't afford another chemical disaster.
   - The interpretive rule is a compromise that came about through significant public input and stakeholder meetings.
   - Some tanks are already exempted from the permitting process including process vessels, temporary tanks and mobile tanks. This includes a number of tanks throughout Kanawha Valley and throughout areas where fracking occurs.

2. **We support a Level 1 tank classification that is protective of the environment and public health.**
   - The definition of a Level 1 AST in the interpretive rule should be revised to match the definition in the rough draft emergency rule. Hazardous substances on the "Lists of Lists" should be automatically classified as Level 1.
   - The Secretary should use the registration database to immediately identify ASTs that do not automatically fit the Level 1 definition, but pose a significant risk, and use his discretionary authority to classify them as Level 1.
   - Regarding the type of chemical that automatically triggers a Level 1 classification, the interpretive rule only includes chemicals on the CERCLA list (Section 2.2.b of interpretive rule). The emergency rule includes these chemicals plus all other chemicals on the List of Lists (Section 2.35 of emergency rule). The emergency rule tank classification is most protective of water. The emergency rule tank classification is also what was agreed to in the meeting that averted the special session. It is important to provide tank owners with

a consistent classification in both rules, and the classification in the emergency rule should be applied in the interim rule.

- Don't exempt storage of food-grade fracking materials used in Oil & Gas exploration or non-contact cooling water that may use chemical treatment from Level 1 and 2 classifications. Instead, use a risk-based approach in classifying food-grade materials and non-contact cooling water.

3. **We Support Secretary's ability to only redesignate tanks as Level 1**

- The interpretive rule allows the Secretary to designate additional Level 1 tanks (Section 2.2.d of the interpretive rule), but does not allow the Secretary to change tanks to lower levels. In contrast, the emergency rule allows the Secretary to designate an AST as any level (Section 1.5.c.4 of the emergency rule). It is important to provide tank owners with a consistent classification in both rules, and in this case, the classification in the interim rule should be kept (and later applied in the emergency rule).

4. **We encourage the Secretary to begin Level 1 classification**

- Now that the registration period has closed, DEP should have a database that can be systematically queried to identify tanks most likely in need of Level 1 classification.
- These might include, for example, tanks very close to zones of critical concern, tanks storing chemicals that are not on the List of Lists because the chemicals have not been fully studied (like MCHM), or tanks that are large but that hold less than 50,000 gallons.

5. **Technicality: Section 4.3**

- 4.3 of the interpretative rule should be revised so that the language "Spill Prevention Plans pursuant to 35 CSR 1 or" and "applicable" is deleted.

Thank you for the opportunity to comment on this Rule's interpretation. After the crisis last January that left 1/6th of West Virginia's citizens without potable water, strict and timely implementation of the legislative mandate will help insure this type of disaster never repeats itself.

Sincerely,

Gary R Zuckett, Executive Director

West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • www.wvcoal.com

October 9, 2014

Mr. Scott G. Mandirola
Director
Division of Water & Waste Management
West Virginia Department of Environmental Protection
601 7th Street, SE
Charleston, WV 25304

Via Electronic Mail: scott.g.mandirola@wv.gov

Re: Proposed Interpretive Rule (47 CSR 62) to Implement Initial Inspection, Certification and Spill Prevention Response Requirements of Senate Bill 373

Dear Director Mandirola:

Pursuant to the public comment notice published by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the proposed interpretive rule.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 98 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient

and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation. We appreciate the opportunity to offer our comments and suggestions on the proposed interpretive rule.

Introduction

WVCA appreciates the efforts of WV DEP to offer clarification to the regulated community regarding imminent deadlines contained in Senate Bill (SB) 373 but we remain concerned generally about the scope and detail of regulations proposed by the agency to implement the provisions of the tank legislation.

WVCA submitted comments to WV DEP on May 15, 2014 in response to the agency's original solicitation for feedback on rules to implement SB 373. Since many of our original comments regarding rulemaking to implement the provisions of the bill are applicable to the proposed interpretive rule, we have attached these original comments and ask that the agency consider them in the context of the current rulemaking. WVCA will also submit detailed comments in response to the agency's recently-published comprehensive rule to fully implement SB 373.

WVCA and its members maintain that aboveground storage tanks (ASTs) located at coal mining operations are adequately regulated through existing statues and rules that are specific to the coal mining industry such as implementation of the West Virginia Groundwater Protection Act (W.Va. Code Chapter 22-22-1 *et.seq.*) and the Groundwater Protection Rules for Coal Mining Operations (38 CSR 2F). As we noted in our original comments, adding additional layers of requirements to this existing structure under the

auspices of SB 373 will lead to regulatory confusion as well as duplicative and potentially contradictory permitting and enforcement requirements.

The West Virginia Legislature recognized that certain industries and facilities may be adequately regulated under existing programs and authorized WV DEP, by rule, to waive certain provisions based on a finding that existing regulations require secondary containment, spill prevention plans, regular inspections and emergency response and notification. WVCA believes that coal mining operations qualify for the exemption contained in W.Va. Code Chapter 22-30-25(b) based on the existence of a dedicated inspector force, mandated inspection frequency and operation of the state's Groundwater Protection Act (GPA) and coal mining-specific groundwater protection rules.

Specific to the interpretive rule, WVCA has concerns (detailed in subsequent comments) related to the classification of water tanks routinely used in the coal mining industry. Other concerns include the designation of ASTs as Level One based solely on capacity, the "default" categorization of certain ASTs based on contents, and requirements for the submission of Spill Prevention Response Plans (SPRPs) for Level Three tanks. WVCA also believes that clarification of certain language regarding tanks containing substances listed/defined as "hazardous substances" under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is warranted.

Specific Comments

Water Tanks

Coal mining operations routinely store water in ASTs for use in dust suppression, maintenance and coal processing activities. These tanks store nothing more than raw water, absent any additives, as withdrawn from the source that may or may not be filtered. As we noted in our original comments, water stored in these tanks is used within the permitted facility and ultimately subject to compliance with any applicable effluent limits at the associated NPDES outlet.

Within the proposed interpretive rule, WV DEP has classified certain water tanks under the Level Three category including tanks containing "filtered" and "demineralized" water. However, the same provision classifies tanks containing water used for "fire or emergency purposes" as Level Three tanks without regard to whether or not the water is filtered.

WVCA believes that to be consistent and focus regulatory attention on the most important tanks and facilities, the language of the rule should be revised to exclude ASTs containing unfiltered water and/or tanks holding water used in dust suppression and coal processing activities.

Default Categorization of ASTs as Level One

The proposed interpretive rule would automatically categorize certain ASTs as Level One tanks regardless of their location. WVCA believes this "default" designation

will dramatically expand the number of Level One tanks and divert regulatory attention and agency resources from ASTs located within Zones of Critical Concern (ZCC).

Any potential risk to public water supplies associated with ASTs relates directly to a given tank's proximity to a water intake or wellhead protection area. Regardless of its contents, a tank poses little risk to a water intake if it is isolated and removed from an intake or wellhead protection area. Other regulatory programs (GPA, federal SPCC) have and will continue to address these tanks in addition to other provisions of SB 373 related to maintenance, reporting and spill prevention.

WVCA urges WV DEP to narrow the definition of Level One tanks to those that present a potential risk to public water supplies by virtue of their location within a ZCC.

AST Size / Capacity

The proposed interpretive rule would automatically categorize all ASTs with a capacity of 50,000 gallons or more as Level One tanks regardless of contents or location. WVCA believes this default categorization is misplaced for several reasons. First, under the current proposal, tanks containing nothing more than raw water would be identified as Level One tanks. The risk to public water intakes from such tanks, even if located within a ZCC would be minimal. Second, as we noted in previous comments above, the risk associated with an AST relates directly to its proximity to a ZCC. If isolated from a ZCC, even a large tank poses little threat to a water supply especially given the comprehensive nature of spill prevention and reporting required under the tank legislation and the application of other regulatory programs.

The language contained in the interpretive rule, regarding tank capacity and size, potentially conflict with other provisions of the proposal. At 47 CSR 62.2.2 the agency has removed from the Level One category certain ASTs such as filtered water and food grade material tanks. However, 47 CSR 62.2.c. automatically classifies ASTs of 50,000 gallons or more as Level One tanks "regardless of location or contents." This language conflicts with the earlier exemption and appears to reclassify ASTs containing substances like food grade materials and filtered water as Level One tanks. If WV DEP does not remove the default categorization of ASTs according to capacity it should at least clarify these provisions of the rule to avoid reclassifying previously exempted tanks.

Finally, WVCA notes that use of 50,000 gallon tanks is relatively common across regulated facilities including coal mining operations, drastically expanding the universe of tanks designated as Level One.

Submission of SPCCs to WV DEP

For Level Two ASTs the interpretive rule allows tank owners to submit federal SPCCs required per 40 CFR 112 to the agency in lieu of submitting a SPRP. WVCA questions the need for the physical submission of these plans to the agency. In the proceeding section of the interpretive rule, 47 CSR 62.4.2, AST owners that have state-mandated GPPs may submit a list of other state permits that correspond with GPPs and certify the plans are current. WVCA believes similar language should be adopted for federal SPCCs. Allowing the submission of a certified list of state permits covered by SPCCs will reduce the sheer volume of paperwork that is exchanged with the agency.

SPRPs for Level Three Tanks

At 47 CSR 62.4.4, the interpretive rule requires Level Three tanks to submit SPRPs. In lieu of submitting an SPRP, tank owners can submit Emergency Response Plans (ERPs) required under the federal Bioterrorism Act of 2002. As we understand this statute, it applies to public water installations and tanks that may be in service at those facilities. As such, the vast universe of other ASTs containing harmless substances such as filtered water will be required to prepare SPRPs according the requirements of SB 373.

WVCA questions the need for SPRPs for Level Three ASTs. As the agency has already recognized, these tanks pose the least possible risk to public health and we question what actual utility or added protection could result from preparing an SPRP for a substance that would likely have no effect on the environment or public health in the event of an accidental release. If WV DEP does not remove the SPRP requirement for all Level Three tanks, we believe the agency should at a minimum remove that requirement for water tanks.

CERCLA Listed Substances

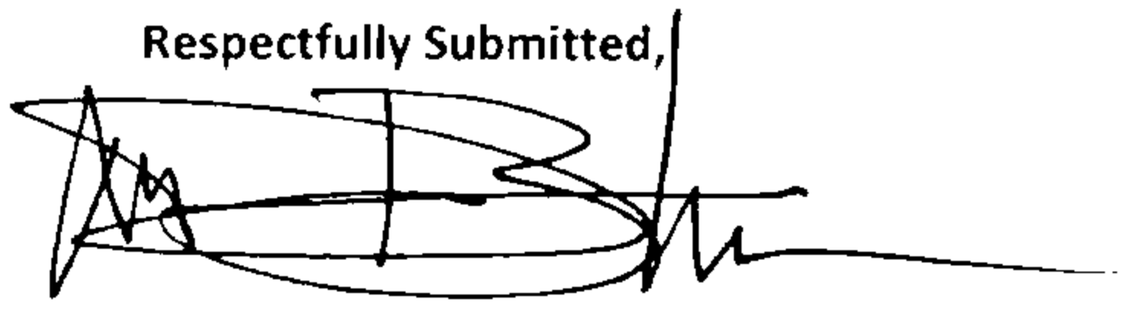
Under the proposed interpretive rule, ASTs containing CERCLA listed / identified substances are automatically categorized as Level Three tanks. As previously noted, WVCA feels that an ASTs proximity to a public water intake and ZCC should be the determining factor in classifying a tank as Level One. However, if WV DEP maintains the currently proposed criteria regarding ASTs containing CERCLA listed substances, we feel that further clarification is warranted. The agency should revise the current language

and ONLY require ASTs that contain *reportable quantities* of CERCLA identified substances be classified as Level One tanks. This would prevent the inclusion of ASTs that may contain only trace amounts of CERCLA materials as Level One tanks.

Conclusion

While WVCA maintains that existing statutes, rules and inspections provide for the adequate regulation of tanks located at coal mining operations, we appreciate the efforts of WV DEP to provide much needed clarity with respect to the deadlines and requirements contained in SB 373. We believe that minor revisions and clarifications will enhance the effectiveness of the interpretive rule and focus both agency and industry resources on the most important tanks and facilities which are located within ZCCs.

Respectfully Submitted,



Jason D. Bostic
Vice-President

Cc: Mr. Harold D. Ward
Director
WV DEP Division of Mining & Reclamation

Mr. Lewis A. Halstead
Deputy Director
WV DEP Division of Mining & Reclamation

West Virginia Coal Association

PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • www.wvcoal.com

May 15, 2014

Mr. Scott G. Mandirola
Director
Division of Water & Waste Management
West Virginia Department of Environmental Protection
601 7th Street, SE
Charleston, WV 25304
Via Electronic Mail: scott.g.mandirola@wv.gov

Re: Rules to Implement Senate Bill 373

Dear Director Mandirola:

Pursuant to the West Virginia Department of Environmental Protection's (WV DEP) letter of April 10, 2014, the West Virginia Coal Association (WVCA) offers the following comments and observations on the scope and detail of planned agency rules to implement the provisions of Senate Bill (SB) 373.

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 98 percent of the Mountain State's underground and surface coal production. WVCA also represents associate members that supply an array of services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable,

equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation. We appreciate the opportunity to offer our comments and suggestions to the agency in order to achieve the legislative policies and goals embodied in SB 373.

Introduction

WVCA was intimately involved with the discussions and debate surrounding the bills that ultimately became SB 373 during the 2014 Regular Session of the West Virginia Legislature. Additionally, WVCA and its members have extensive experience with permitting and compliance under the state's major environmental programs, including the West Virginia Surface Coal Mining & Reclamation Act (WV SCMRA), the Clean Water Act (CWA) Section 402 NPDES program, the West Virginia Groundwater Protection Act (GPA) and the federal Spill Prevention Control and Countermeasures (SPCC) regulations.

WVCA believes the regulation of aboveground storage tanks (ASTs) at coal mining operations is adequately addressed by the presence of overlapping and duplicative rules and regulations without the addition of an unnecessary regulatory burden by WV DEP as the agency formulates the rules to implement SB 373. As the following comments detail, mining operations are highly regulated by a dedicated inspector force and have mandated routine inspections.

According to federal oversight statistics, WV DEP conducted more than 25,000 complete and partial inspections at coal mining operations last year.[1] This inspection

[1] "Annual Evaluation Report of the West Virginia Mining Regulatory Program" U.S. Office of Surface Mining Reclamation & Enforcement, Charleston Field Office, 2013 http://odocs.osmre.gov/

frequency is in stark contrast to the facility that was the site of the January 9, 2014 spill and other situations discussed at the Legislature which, in part, inspired the need for a new program to regulate ASTs. Additionally, ASTs at coal mining operations are subject to an extensive, mature regulatory program implemented pursuant to the GPA and state rules developed under that statute specifically for coal mining facilities. Finally, the use of ASTs at mining operations deserves separate consideration due to additional regulatory requirements imposed under the federal SPCC regulations along with the nature of the mining process itself.

We specifically encourage the DEP to consider the following (detailed in the comments that follow):

- ASTs on mining operations are already regulated under the State's GPA and accompanying legislative rules. We ask that WV DEP consider using the GPA to regulate ASTs on mining operations rather than establish a new regulatory program.

- Under the GPA, coal mining operations are subject to the payment of groundwater protection fees and we therefore ask that these be considered when calculating the new registration fee structure for ASTs.

- The coal industry has a highly-specialized inspector force already in place. There is no need for an additional inspector force to regulate ASTs in the coal industry.

- Given the existing regulatory program (GPA), dedicated inspector force, and the already mandated inspections, we believe that ASTs in the coal industry should be exempt from the permitting and other requirements of the new Act.

- WV DEP should separate its GPA / GPP or any other permitting requirement related to SB 373 from the NPDES permitting structure.

- There are several coal-specific issues that require specific consideration that are detailed in the final portion of these comments.

The Groundwater Protection Act / Inspection and Enforcement at Coal Mining Operations

Historically, the monitoring and inspection of ASTs at mining operations has been addressed through implementation of groundwater protection plans (GPPs) which are required by West Virginia's GPA and its accompanying legislative rules and federal SPCC regulations.

Many of the key requirements of SB 373 are similar to the requirements that exist currently under the West Virginia Groundwater Protection Rules for Coal Mining Operations, 38 CSR 2F. For example, 38 CSR 2F requires the development of GPPs, which must include an inventory of all operations and activities that "may be reasonably expected to contaminate groundwater" (38 CSR 2F.3.3.1.a), requirements for installing and maintaining secondary containment on ASTs (38 CSR 2F.3.6.1) as well as provisions for inspections of facilities and review of GPPs at given intervals (38 CSR 2F3.3.1.d). The effectiveness of this regulatory program was demonstrated when DMR completed GPA inspections at 93 coal preparation plants within a few days of the Elk River chemical spill. Ninety-seven percent of these operations were in full compliance with the GPA and its implementing rules.[2]

By virtue of the GPA, coal mining operations are also subject to the payment of groundwater protection fees per the requirements of 47 CSR 55. Any calculation of the

[2] Testimony of Division of Mining & Reclamation Director Harold Ward before the West Virginia Legislature's Select Committee on Water Resources, February 21, 2014

fees under SB 373 should acknowledge the fees paid by industry under the existing GPA program.

As discussed frequently during the legislative debate surrounding the passage of SB 373, coal mining operations are unique within the state's environmental regulatory structure, in that mining operations have a highly-specialized inspector force that is completely dedicated to the regulation of coal mining operations, and each mining operation is required to be inspected at a given frequency.[3] While the inspection frequency is mandated by WV SCMRA, Division of Mining & Reclamation (DMR) inspectors are authorized by statute to enforce other environmental programs including the state's GPA. DMR inspectors have received specialized training on the GPA and its various components, including the coal mining-specific GPA rules (38 CSR 2F) and the Groundwater Protection Act Penalty Rule (47 CSR 56). Implementation and enforcement of the GPA-related programs and rules is routinely carried out by DMR.[4]

WVCA believes the existence of the mining-specific regulatory program, dedicated inspector force and mandated inspection frequency falls within the purview of W.Va. Code Chapter 22-30-25(b). This provision of SB 373 allows WV DEP to designate additional categories of ASTs for which a permit may be waived, upon finding that a tank is adequately regulated by a program that requires secondary containment, spill prevention, leak detection and control inspections, regular inspections and emergency response and notification. To the extent the coal-mining specific GPA rules

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[3] *See generally* W.Va. Code 22-3-15 *et.seq.* and 38 CSR 2.20.1 *et.seq.*

[4] *See generally* "Groundwater Training for DMR Inspectors, "West Virginia Department of Environmental Protection, 1996.

do not exactly match those of SB 373, WVCA believes additional requirements could be incorporated by revision to the existing GPA rule to match those mandates, provided the GPA / GPPs are no longer tied to the operation's corresponding NPDES permit.

Implementation of SB 373 / AST Permitting

As our previous comments explain, WVCA believes that ASTs at mining operations are adequately regulated by the DMR under the state's GPA and coal mining-specific groundwater rules. However, WV DEP's practice of including the GPA and its required GPPs within the CWA Section 402 NPDES permit, or incorporating the requirements of the new AST statute into a different section of the NPDES permit presents potential regulatory complications.[5]

As WV DEP is fully aware, the federal Environmental Protection Agency (EPA) maintains jurisdiction over the state's implementation of its NPDES program. EPA has the authority to review, comment on and object to any NDPES permit drafted by WV DEP. If the federal agency's concerns about a state-drafted NDPES permit cannot be resolved, the authority to issue the permit transfers to EPA from WV DEP.[6] EPA also maintains jurisdiction and has the ability to undertake independent enforcement action under the CWA for alleged violations of state-issued NPDES permits.[7] Including the existing GPA / GPP, or any new requirement related to the implementation of SB 373 in the NPDES permit, creates a vehicle for lawsuits in federal court for purported violations

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[5] The inclusion of the GPA /GPP into the NPDES permit appears to have occurred as a matter of convenience for administrative purposes since there are no corresponding federal requirements for permitting tanks except for those containing petroleum products.

[6] 40 CFR 123.44

[7] 33 USC 1319 (a) (2) *et.seq*.

of the GPA and/or the new AST statute. Creating a "federal right of action", either by EPA or third party lawsuit, is directly counter to the intent of the new AST statute, as evidenced by the extensive discussions and debate on that particular point when SB 373 was considered by the Legislature as well as the lack of a "citizen suit" provision in the statute itself. *To avoid this situation, WV DEP should separate the GPA /GPP from the existing NDPES permit.*

ASTs at Coal Mining Operations

WVCA would ask that WV DEP give consideration to situations that are likely specific to the coal mining industry and its use ASTs as the agency develops its regulatory program to implement SB 373. First, in certain situations ASTs used at mining sites are owned and provided by outside vendors. When a tank is no longer needed or a mining company's relationship with a given dealer ends, the vendor removes the tank from the mining site. Further, a vendor can remove and /or replace a tank at their discretion. As WV DEP develops its AST registration form (W.Va. Code Chapter 22-30-4) and the other provisions of the statute, WVCA would ask the agency to consider tank ownership and the use of tanks by mining companies through vendor / contractor relationships. Specifically, registration should follow the AST and its owner, not necessarily the specific site and operator.

ASTs are frequently used at mining sites in order to meet applicable NPDES effluent limits. Deployment of ASTs for water treatment purposes must occur quickly, in some instances, to prevent effluent limit violations. WVCA would ask WV DEP to consider the need for rapid deployment of ASTs to address a temporary environmental

condition, such as water treatment, as the agency contemplates registration and permitting requirements under the new statute. For example, WV DEP could allow the use of an unregistered tank for a period of 60 days in the event of the need for an unanticipated tank deployment, such as compliance with permit limits or in the event a tank must be replaced based upon routine inspections.

Coal mining operations routinely withdraw and store in ASTs untreated water for use in dust suppression and other processing activities. Since these tanks store nothing more than water as withdrawn from the source, which may or may not be filtered water, WVCA believes they should qualify for an exemption as set forth in the agency rules. Any water used from these tanks at a facility is ultimately subject to meeting compliance with applicable effluent limits at the associated NPDES outlet.

In addition to traditional ASTs used for the storage of liquids, coal processing plants and facilities employ various containers, structures and associated pipes to prepare coal for shipment to the customer. Since these devices "are utilized in a facility in the manufacturing process through which there is a steady, variable, recurring or intermittent flow of materials," as noted in the statute, WVCA believes they are properly characterized as "process vessels" and excluded from the registration and permitting requirements as specified in W.Va. Code Chapter 22-30-3.

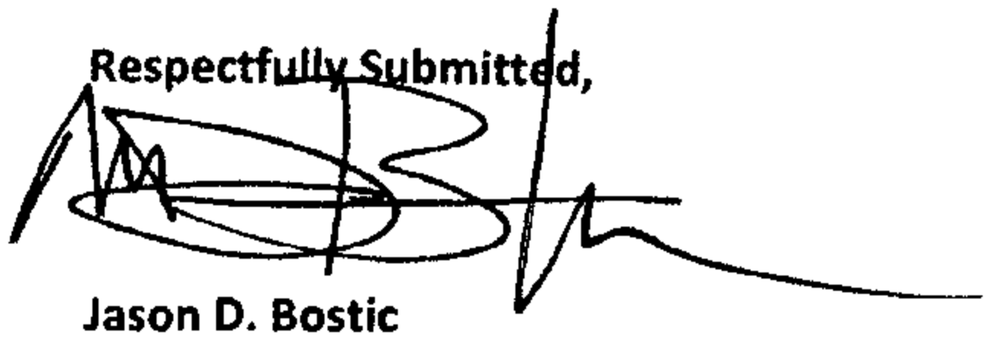
WVCA also encourages WV DEP to consider including provisions in the rules to implement SB 373 that account for tanks that are located on a site but not used to store liquids. These containers should be considered as "not in service" and any registration

and/or permitting of those tanks should only be required before they are actually used for the storage of materials.

Conclusion

In summary, WVCA believes existing statutes, rules and inspections provide for the adequate regulation of ASTs at coal mining operations. The imposition of an additional regulatory program under the auspices of SB 373 is duplicative and will serve to confuse and frustrate the agency's effective regulation and inspection of ASTs at mining sites.

Respectfully Submitted,



Jason D. Bostic
Vice-President

Cc: Mr. Harold D. Ward
Director
WV DEP Division of Mining & Reclamation

Mr. Lewis A. Halstead
Deputy Director
WV DEP Division of Mining & Reclamation

KB

WEST VIRGINIA MUNICIPAL WATER QUALITY ASSOCIATION
315 W. Main St.
P.O. Box 1310
Bridgeport, West Virginia 26330
304-842-8231

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WV DEPARTMENT OF ENVIRONMENTAL PROTECTION
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September 10, 2014

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GENERAL COUNSEL

Paul Calamita, AQUALAW

Mr. Randy C. Huffman
Secretary
WV DEP
601 57th Street, S.E.
Charleston, WV 25304-2345

Re: Raw/Finished Water Storage Tank Exemption from AST Legislation

Dear Secretary Huffman,

I am writing on behalf of the West Virginia Municipal Water Quality Association ("WVMWQA") to urge you to support an exemption for water storage (raw or finishing) and processing tanks from the requirements of the Aboveground Storage Tank ("AST") legislation (SB 373) enacted earlier this year. We understand that a special session of the legislature is likely to address changes to this legislation. This is the ideal opportunity to support a common sense amendment to exempt raw and finished water storage and processing tanks from coverage under the law.

While we support the legislature's intent behind SB 373, regulating water storage and processing tanks does not make any sense. Put simply, the regulatory net has been cast too widely. Requiring the regulation and inspection of water storage and processing tanks in the name of protecting drinking water resources makes no sense. Moreover it will impose an unnecessary and significant burden on water systems statewide. The tanks in question present no threat of chemical contamination.

Accordingly, we urge DEP to support an exemption for raw/finished water storage and processing tanks during the upcoming special session.

Thank you for considering this request. Please let me know if you have any questions or should you require additional information.

Sincerely,

David C. Sago
President

C: WV MWQA Board
Scott Mandirola

Ombler, Tonya K

From: Calamita, Paul <paul@aqualaw.com>
Sent: Saturday, September 13, 2014 5:13 PM
To: WV DEP Tank Rules
Cc: Patrick Fanning; Morel, Meghan
Subject: Proposed Interpretive Rule: Support for Potable Water Tanks Level 3 Classification

I am writing on behalf of the WV Municipal Water Quality Association. Our members provide public water, sewer, and stormwater service to communities statewide. We write in support of the Interpretive Rule's proposal to designate potable water tanks and tanks with filtered surface water (both regardless of size) as Level 3 ASTs. We support this common sense designation because these tanks impose no risk to water quality or public water supply (the focus of the AST legislation). Quite frankly, we think all water tanks (raw, filtered, finished) - of any size - should be level 3 ASTs.

We also hope that DEP will support a legislative exemption for all water tanks should the Legislature revisit the AST law during the 2015 session.

Finally, we would like to thank Ruth Portman for her responsiveness with regard to questions we had about the proposed interpretive rule.

Thank you for considering our comments. Please let me know if you have any questions.

Paul Calamita
General Counsel
WV Municipal Water Quality Association
804-938-4211

Ombler, Tonya K

From: Calamita, Paul <paul@aqualaw.com>
Sent: Thursday, October 02, 2014 9:29 AM
To: WV DEP Tank Rules
Cc: Patrick Fanning
Subject: RE: Proposed Interpretive Rule: Support for Potable Water Tanks Level 3 Classification

Following up on our comment below, we suggest the following specific clarification shown as an addition to Section 2.2 in underline and yellow highlight:

Please make the following clarification to **§47-62-2(2.2)**:

2.2. "Level 1 AST" means an AST that is determined by the Secretary to have the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264. Except as provided in Sections 2.3 and 2.4, An AST that meets any of the following criteria is a Level 1 AST:

Paul Calamita
AQUALAW
15 Years of Excellence
(804) 716-9021 x201
(804) 716-9022 (fax)
(804) 938-4211 (cell)
www.AquaLaw.com

From: Calamita, Paul
Sent: Saturday, September 13, 2014 5:13 PM
To: 'WVDEPtankrules@wv.gov'
Cc: Patrick Fanning; Morel, Meghan
Subject: Proposed Interpretive Rule: Support for Potable Water Tanks Level 3 Classification

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We also hope that DEP will support a legislative exemption for all water tanks should the Legislature revisit the AST law during the 2015 session.

Finally, we would like to thank Ruth Portman for her responsiveness with regard to questions we had about the proposed interpretive rule.

Thank you for considering our comments. Please let me know if you have any questions.

Paul Calamita
General Counsel

WV Municipal Water Quality Association
804-938-4211

Comments of the
West Virginia Manufacturers Association
regarding the
Initial Inspection, Certification and Spill Prevention Response Plan Requirements Under W. Va. Code §§22-30-6 And 22-30-9

Title 47, Series 62

The West Virginia Manufacturers Association offers the following with regard to Title 47, Series 62, the proposed interpretative rule that is intended to implement the requirements of the Aboveground Storage Tank Act, *W. Va. Code* Chapter 22, Article 30.

1. Designation of Level 1 ASTs.

We urge the DEP to limit the scope of tanks in Level 1 to those that present a potential danger to public water supplies. The proposed definition is so overbroad that it includes relatively innocuous tanks. For example, we do not believe that tank contents are relevant to risk of harm if a tank is not located in a zone of critical concern, or is otherwise in a place where a spill could not easily reach state waters. The same is true of large tanks – if they are not in a place where the contents can reach a public water supply, they should not be subject to more onerous regulation. Level 1 tanks should be those ASTs located within a zone of critical concern, and such other tanks as the DEP affirmatively identifies, subject to appeal by the AST owner.

By referencing ASTs "located within a zone of critical concern, wellhead protection area or groundwater intake area under the influence of surface water" the DEP is using terms that may not be appropriate for this interpretive rule. Some requirements of the Act do apply to all three types of sources (*see, e.g., W. Va. Code* 22-30-15(d)), while others apply to zones of critical protection (*W. Va. Code* 22-30-25(a)(9)), which are undefined but are clearly intended to be zones of critical concern. The definition of Level 1 tanks should be limited to those which are in zones of critical concern, and not areas influencing groundwater wells, even surface water-influenced groundwater wells, which have different times of travel associated with them.

There should also be a means of redesignating tanks within zones of critical concern from Level 1 to Level 2 or 3 if the tank owners or operators demonstrate that a tank has no reasonable potential to affect a public water supply. For example, there are brine tanks that are within zones of critical concern which, even if they released all their contents, would not have an effect on a

downstream water intake. The owners and operators should be able to request redesignation of a tank in in such circumstances.

We further suggest that tanks holding unfiltered surface water should also be included among the Level 3 tanks.

We offer the following language to replace that currently found in Section 2.2:

"Level 1 AST" means an AST located within a zone of critical concern, or an AST designated as Level 1 by the Secretary. A designation of an AST as a Level 1 tank is appealable to the Environmental Quality Board. The owner or operator of an AST that is designated as Level 1 solely because it is located within a zone of critical concern may request redesignation as a Level 2 or Level 3 tank upon providing the information, if any, requested by the Secretary. Tanks used for potable water, filtered or unfiltered surface water, demineralized water, noncontact cooling water, or water stored for fire or emergency purposes are not Level 1 ASTs regardless of their location or size.

2. Designation of Zones of Critical Concern

Section 2.2.A designates as a Level 1 tank any "AST located within a zone of critical concern, wellhead protection area or groundwater intake area under the influence of surface water. . ." The DEP has advised businesses that it will notify them if any tanks are within these designated areas, and we urge the DEP to provide those notifications as soon as possible, so that the owners and operators of the tanks can take appropriate action. We also urge the DEP to provide information as to how that ZCC was determined, so that each AST owner can evaluate the zone for accuracy and compliance with the statutory definition.

3. Tanks Containing CERCLA Hazardous Substances.

As we comment above, we do not think that tanks that contain a CERCLA hazardous substance should automatically be designated as Level 1 tanks unless they are in a zone of critical concern. However, to the extent the DEP does not change the Level 1 definition in the manner we suggest, we seek confirmation that a trace amount of a hazardous substance is not enough to cause an AST to be treated as a Level 1 tank, and that the DEP intends to regulate as Level 1 those tanks that are used to store fluids that are primarily hazardous substances. Therefore, we suggest that §2.2.b be rewritten to begin "*An AST that contains a fluid that is primarily a substance defined in . . .*"

4. Large Capacity Tanks.

We do not believe that large capacity tanks should automatically be Level 1 tanks, regardless of where they are located or what they contain. However, if large tanks are to be regulated, we believe they should be more exceptional in size than 50,000 gallons. That quantity is roughly the size of the largest tanks that can be shop-constructed and moved to a site by truck. A capacity of 100,000 gallons would be more appropriate, and we suggest that figure be used by the DEP.

5. Definition of Level 1 ASTs.

Section 2.2 describes what constitutes a Level 1 AST, exempting "ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. §264." While we believe it is evident that any tank containing such substances is not subject to regulation as a Level 1 AST, there is some potential confusion presented by §2.2.c, which states that a Level 1 AST is "an AST with a capacity of 50,000 gallons or more, regardless of location or contents." The last phrase suggests that the potable water, filtered surface water and other similar nontoxic contents might be regulated if they were found in an AST with a 50,000 gallon capacity or greater. We suggest that the phrase "regardless of location or contents" be removed. We also suggest that unfiltered surface water be added to the list of tank contents that qualify a tank as Level 3.

6. Level 3 ASTs

Hazardous waste tanks that are regulated under 40 C.F.R. Part 264 are regulated as Level 3 tanks according to section 2.4 of the interpretive rule. We suggest the DEP consider whether this should read "40 C.F.R. Parts 264 and 265"

7. Spill Prevention Control and Countermeasures Tanks.

Spill Prevention Control and Countermeasures (SPCC) tanks are exempt from permitting under Section 5 of the AST Act, "either because they do not represent a substantial threat of contamination, or they are currently regulated under standards which meet or exceed the protective standards and requirements set forth in this article . . . ." *W. Va. Code* 22-30-25(a). The exemption from permitting was clearly intended as an exemption from the requirements of the permit program, such as leak detection, corrosion prevention and other tank standards found in *W. Va. Code* 22-30-5(b). As such, SPCC tanks are not subject to the same certification as other ASTs, which are to certify compliance with the standards established pursuant to Section 5

of the AST Act. We suggest the inclusion of a new subsection, 3.4, which would state the following:

"3.4 The owner or operator of an AST for which a spill prevention control and countermeasures plan is required by 40 C.F.R. Part 112, and that is not located within a zone of critical concern, shall certify that the AST complies with all requirements of 40 C.F.R. Part 112 in lieu of any other certification required by the Act."

To the extent the DEP does not agree with our interpretation of the AST Act, we would suggest that SPCC tanks that are not within a zone of critical concern and are less than 50,000 gallons are likely to be Level 2 or Level 3 tanks unless they qualify under one of the Level 1 criteria in §2.2. We suggest that a default designation to Level 3 be made for SPCC tanks, absent qualifying for another level.

8. Definition of Wellhead Protection Area.

As noted previously, we are not certain that wellhead protection areas should be factors in the designation of Level 1 tanks. If they are, we note that the wellhead protection area referred to in the interpretive rule is presumably the same as the "source water protection area," a term which is defined in the Act and refers to an area in which a spill could reach a groundwater well within 5 years. Section 2.5 of the interpretive rule should provide the same reference to a five year time of travel for wellhead protection areas.

9. The Initial Annual Certification Standard Should Be To National Industry Standards.

Section 3.3 of the interpretive rule states that annual inspections "shall be conducted in accordance with the industry standard appropriate to the tank or tank facility. . .and shall, at a minimum, conform to the requirements set forth in Appendix B." The DEP has set up a nearly-impossible task for the owners and operator of Level 1 ASTs. Owners and operators can certify compliance with industry standards for ASTs, as those are standards that have been applicable to the tanks for many years. However, the requirements of Appendix B do not necessarily correspond with the requirements of industry standards such as API 653; for example, internal coatings are not inspected fully every year under API 653, but they are on the interim inspection checklist of matters to be certified this year. Checking liners would require emptying tanks and taking other actions that can't be done this year for all tanks. More importantly, the "requirements" in Appendix B are not standards that anyone can certify compliance with; they

are categories of equipment and practices for which standards can be developed. While the emergency rule probably will contain some standards to which compliance can be certified, owners and operators of tanks cannot possibly wait until a final emergency rule is issued in December to find out whether they can certify their tanks.

This difficulty can be easily resolved by allowing owners and operators to elect to certify to national standards such as API 653. The AST Act clearly allows the DEP to take this approach. Section 6 of the AST Act requires that "every owner or operator shall submit, on the form prescribed by the secretary, a certification from the engineer that each tank, associated equipment, leak detection system and secondary containment structure meets the minimum standards established by this article or by the secretary by rule." *W. Va. Code* §22-30-6(a). The requirements in Appendix B are drawn from *W. Va. Code* §22-30-5(b), which requires the DEP to develop a permit program for aboveground storage tanks and sets out a series of factors that the DEP must consider in adopting that program. However, nothing in §5 is self-implementing; in that section the Legislature has described what the DEP must consider when crafting the permit program. To date, the DEP has not adopted such a permit program, and therefore the requirements in §5(b) of the AST Act remain ineffective. Furthermore, as there will be no final permit program established by the emergency rule until late this year or early next year, it will be impossible for tank owners to certify tanks in accordance with standards that may be adopted only a short period of time before certification is required. In these circumstances, the only approach that makes sense is for the tank owners to certify their ASTs in accordance with national tank standards such as API 653 and leave the more detailed certification requirements for the certification that is due January 1, 2016.

Handling the certification in this fashion is consistent with the AST Act, which allows certification of "the minimum standards established by this article or by the secretary by rule" (emphasis added). Certification is done either in accordance with the requirements of the article (i.e., the requirements of §5(b) of the AST Act) or by a rule developed by the DEP. The requirement is stated in the alternative, not in the conjunctive form. The Secretary is free to develop rules that define what must be part of the annual inspection and certification, without regard to §5 of the AST Act. Certainly in the first year, when AST owners and operators will have had insufficient information about what must be certified, the DEP could offer a

clarification in this interpretive rule that certification of compliance with national tank standards is sufficient.

This could be accomplished by deleting the phrase "and shall, at a minimum, conform to the requirements set forth in Appendix B" at the end of Section 3.3 of the interpretive rule.

10. Certification of Tanks That Are Not in Service.

While nonoperational tanks are subject to registration, they should not be subject to certification, or included in Spill Prevention Response Plans. ASTs should be subject to certification before they are put into service, not while they are out of service. Furthermore, tanks that are permanently out of service, by being rendered incapable of holding liquids, no longer meet the definition of ASTs and should be exempt from the interpretive rule. We would appreciate confirmation that SPRPs and inspections are not required for nonoperational tanks, and that permanently closed tanks are not subject to the Act, and therefore not subject to this rule.

11. Use of a Groundwater Protection Plan in Lieu of a Spill Prevention Response Plan.

The DEP will allow the owner or operator of a Level 2 AST who has submitted a groundwater protection plan to the DEP the opportunity to certify that the plan is current, and to use that plan in lieu of preparing a SPRP. In some circumstances, a GPP may have been prepared, but was not submitted to the DEP. We urge the DEP to allow Level 2 AST owner or operator to submit a GPP to the DEP, along with a certification that it is currently in effect, in place of developing an SPRP.

12. Appeal Rights.

We seek clarification that the appeal provisions of *W. Va. Code* §§22-30-18 and 22-30-5(b)(14) apply to actions taken by the Secretary in accordance with this interpretive rule and that any person adversely affected by a designation of the DEP (e.g., designation of an AST as a Level 1 tank) may appeal to the Environmental Quality Board.

WVONGA

WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION

October 9, 2014

Secretary Randy Huffman
c/o WVDEP – Public Information Office
601 57th Street, SE
Charleston, West Virginia 25304

Dear Randy:

RE: West Virginia Oil and Natural Gas Association Comments

Enclosed please find West Virginia Oil and Natural Gas Association's comments regarding Interpretive Rule filed on September 9, 2014, entitled: "Initial Inspection, Certification and Spill Prevention Response Plan Requirements" Proposed Rule Title 47, Series 62.

Sincerely,

Nicholas DeMarco
Executive Director

ND/mgb

Enclosure

West Virginia Oil and Natural Gas Association
Comments Regarding Interpretive Rule Filed on September 9, 2014, Entitled:
"Initial Inspection, Certification and Spill Prevention Response Plan Requirements"
Proposed Rnle Title 47, Series 62
October 9, 2014

The West Virginia Oil and Natural Gas Association (WVONGA) appreciates the opportunity to comment on the Proposed Interpretive Rule Title 47, Series 62: "Initial Inspection, Certification and Spill Prevention Response Plan Requirements," for complying with the initial inspection and certification requirements (W. Va. Code § 22-30-6) and the requirement for submitting Spill Prevention Response Plans (W. Va. Code § 22-30-9) of the Aboveground Storage Tank Act, W. Va. Code § 22-30-1, et seq. ("the AST Act"). WVONGA, chartered in 1915, is one of the oldest trade organizations in the State, and is the only association that serves the entire oil and gas industry. The activities of our members include drilling, completion, gathering, transporting and processing. WVONGA members operate in almost every county in West Virginia and employ thousands of people across the State, with payrolls totaling hundreds of millions of dollars annually. Our members have cumulative investment of nearly ten billion dollars in West Virginia, account for 75% of the production and 80% of the permits, operate more than 15,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses.

WVONGA incorporates by reference those comments on the development of rules to complement the AST Act it submitted on May 13, 2014. As noted in that previous submission, the AST Act contains at least two classes of exemptions (some from the entire Act and others from the Act's permitting requirements). West Virginia already has an extraordinarily comprehensive regulatory program in place for the oil and gas industry, including W. Va. Code §§ 22-6-1, et seq., 22-6A-1, et seq., and regulations issued thereunder, and there are several other enforceable programs in place that regulate aboveground storage tanks ("ASTs"). WVONGA

urges the Department of Environmental Protection ("DEP") to create rules that complement existing programs and avoid duplicative or conflicting regulations.

In this regard, WVONGA supports the Interpretive Rule insofar as it reflects DEP's decision to focus the implementation of the substantive requirements of the AST Act on those ASTs that present some realistic degree of risk to public drinking water supplies, which is the stated purpose of the legislation. As described below, WVONGA encourages the agency to expand its efforts in this regard and, further, to adopt this same approach in finalizing the pending Emergency Rule and in promulgating a Legislative Rule addressing the general requirements of the AST Act.

Specific Comments on Proposed Interpretive Rule Language.

The following are WVONGA's specific comments and suggestions regarding the proposed language of Title 47, Series 62:

1. Graduated levels of regulation for ASTs

WVONGA appreciates the agency's attempt to provide graduated levels of regulation for ASTs depending upon the AST's potential for risk of harm to public health or the environment, and specifically, threats to West Virginia drinking water supplies. WVONGA encourages the agency to focus on the protection of public water supplies as it makes its policy decisions. In that vein, WVONGA appreciates the opportunity to offer the following suggestions relating to the definitions of Level 1 and Level 3 ASTs:

a. **Water.** The definition of a Level 1 AST, found at proposed Code of State Rules (CSR) 47-62-2.2, is inconsistent in that it exeepts from the definition, "ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade

materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264…" and then further defines "Level 1 ASTs" to be, "[a]n AST that meets any of the following criteria …2.2.c. An AST with a capacity of 50,000 gallons or more, regardless of location or contents…" Section 2.2.c. confuses the issue as to whether a tank containing water would then be brought back into regulation as a Level 1 AST.

WVONGA seeks agency clarification, or an appropriate revision, that tanks used by the oil and gas industry to store freshwater (whether filtered or unfiltered) for hydraulic fracturing will be considered Level 3 tanks and not included in Level 1. The agency should consider including, in addition to "filtered surface water," "water that has been diverted from natural sources, such as but not limited to, streams, rivers, and lakes, and has not been used in any industrial process" in the exclusion from Level 1 and included in Level 3.

b. **RCRA**. The definition of a Level 1 AST excludes ASTs regulated pursuant to 40 Code of Federal Regulations (CFR), Part 264, but not ASTs regulated pursuant to 40 CFR, Part 265. Both types of ASTs are appropriately managed under the federal Resource Conservation Recovery Act (RCRA). The regulations at 40 CFR, Part 265 regulate "ninety (90) day" ASTs. RCRA ninety (90) day tanks have similar inspection requirements as 40 CFR, Part 264 RCRA ASTs. WVONGA urges that the agency amend the definition of Level 1 AST to provide an exception for ASTs regulated by 40 CFR, Part 265.

c. **High risk determination**. The proposed rule gives the Secretary the discretion to elevate in status other ASTs, which would not otherwise be subject to Level 1

regulation based upon factors including, without limitation, tanks that contain substances that are on the United States Environmental Protection Agency's (EPA) "Consolidated List of Chemicals Subject to the Emergency Planning and Community Right to Know Act (EPCRA), CERCLA, and § 112(r) of the Clean Air Act (CAA)" (known as "the List of Lists") as provided by 40 CFR, Parts 355, 372, 302, and 68, regardless of the AST's location. WVONGA suggests clarification that any such agency determination based on the presence of those substances must be based on there being sufficient volume of the substance to clearly represent a potential high risk of harm to public health or the environment, in order to classify a tank as Level 1. This decision should be mandated to be by order and be made subject to appeal. WVONGA also seeks clarification, or an appropriate revision, that the substance in the tank must be liquid at standard temperature and pressure in order to be subject to the requirements of the Act and this rule. In as much as the Seeretary has the authority under this provision to determine which tanks are high risk, we do not believe it is either necessary or appropriate to arbitrarily designate tanks with capacity to hold 50,000 gallons to be included in Level 1 when they may not contain any liquid at all. (See § 2.2.c). Similarly, we do not belive it is either necessary or appropriate to arbitrarily designate tanks holding any volume of CERCLA hazardous substances when those volumes may not be enough to ereate a high risk. (See § 2.2.b).

d. **Mobile**. The AST Act specifically exempts mobile tanks on-site less than 60 days. However, the oil and gas industry uses many mobile tanks on a temporary basis that may be on-site longer than 60 days during drilling, completion,

production and midstream operations. These mobile tanks hold less than 500 barrels of fluids and contain drilling fluids, water to be used for drilling or hydraulic fracturing water, flowback water, and fuel. In the midstream sector, mobile rental tanks hold fresh water used for hydrostatic testing and water removed from the pipeline after hydrostatic testing. Many of these mobile tanks are rented from vendors and pursuant to the rental agreements, these tanks are suitable for containing liquids, thus are clean, and leak proof when delivered to the customer. The vendors are also responsible for tank maintenance. These mobile tanks move with the associated operations, similar to the drilling rig and the completion equipment moving from site to site, and are not used for long-term storage. Due to the portable and temporary nature of these mobile tanks, WVONGA urges that the Secretary exclude mobile tanks used for drilling, completion, production and midstream activities from the definition of AST set forth in Section 3 of the Act, or at the very least specify that all such mobile ASTs shall be considered Level 3 tanks.

e. **SPCC outside ZCC**. W. Va. Code § 22-30-25 specifically waives permitting requirements for ASTs for which Spill Prevention Control and Countermeasures (SPCC) Plans are required by the EPA under 40 CFR Part 112 that are not within a zone of critical protection (presumably, the same thing as a zone of "critical concern") because the Legislature determined these ASTs "either do not represent a substantial threat of contamination, or they are currently regulated under standards which meet or exceed the protective standards and requirements set forth in this article." Based on this legislative finding, WVONGA urges that

ASTs which are subject to an SPCC Plan outside the ZCC should be excluded entirely from the inspection, certification and SPRP requirements, or if not excluded entirely from those requirements, then designated as a type of Level 3 ASTs that are subject only to the Act's registration requirements.

f. **SPCC within ZCC**. The W.Va. Code § 22-30-25(b) gives DEP the authority to designate additional categories of ASTs for which an individual AST permit may be waived. WVONGA suggests that ASTs, which are subject to an SPCC Plan within the ZCC, should also be excluded entirely from the inspection, certification and SPRP requirements if the SPCC plan is voluntarily submitted to DEP for approval, or if not excluded entirely from those requirements, then designated as a type of Level 3 ASTs that are subject only to the Act's registration requirements.

g. **Tanks with plans comparable to SPCC plans outside the ZCC**. WVONGA suggests that ASTs located outside the ZCC not regulated pursuant to 40 CFR, Part 112 but, which are made subject to a plan that is comparable to an SPCC Plan, should also be excluded entirely from the inspection, certification and SPRP requirements, or if not excluded entirely from those requirements, then designated as a type of Level 3 ASTs that are subject only to the Act's registration requirement. Since failure to have such a comparable plan in place would not qualify such a tank from permitting exemption, this approach would result in an enforceable mechanism.

h. **Tanks with plans comparable to SPCC plans inside the ZCC.** WVONGA suggests that ASTs located inside the ZCC not regulated pursuant to 40 CFR, Part 112 but, which are made subject to a plan that is comparable to an SPCC Plan,

should also be excluded entirely from the inspection, certification and SPRP requirements, or if not excluded entirely from those requirements, then designated as a type of Level 3 ASTs that are subject only to the Act's registration requirement. Since failure to have such a comparable plan in place would not qualify such a tank from permitting exemption, this approach would result in an enforceable mechanism.

2. Wellhead Protection Area

WVONGA suggests that the agency eliminate the term "wellhead protection area" from § 2.2.a and associated references within the interpretive rule since these areas are not the subject of the AST Act. The rule should focus on the zone of critical concern as defined in the AST Act.

3. AST Definition

The definition of "AST" in the proposed rule should be consistent with the AST Act. WVONGA suggests the following definition for "AST," "2.1 'AST' means an aboveground storage tank as that term is defined in W. Va. Code §22-30-3(1)."

4. Inspection and Certification

Level One ASTs must be inspected by a West Virginia certified Professional Engineer (PE), a person working under the supervision of a PE (though the inspection certification must be signed by the PE), or a certified API /STI inspector. For Level Two and Three ASTs, the inspection can be performed by any of the people authorized to perform an inspection for Level One AST, and the owner/operator of the tank or a designee of the owner/operator of the AST. These inspections must be certified and inspections "shall be conducted in accordance with the industry standard appropriate to the tank or tank facility . . . and shall, at a minimum, conform to the requirements set forth in Appendix B." The general guidance provided in Appendix B is not

necessarily consistent with industry standards. Section 3.1 of the interpretive rule reflects inspection/PE certification of Level 1 "tanks" (nothing else) is to be performed in accordance with Appendix A and Appendix B. Appendix B conflicts with Section 3.1, as it references "AST systems," which is an undefined term in the interpretative rule. Additionally, the rule does not provide any change in the statutory timing of the inspections – inspections must be performed by January 1, 2015. Given the short time frame, WVONGA suggests that the agency clarify that where there are discrepancies as to whether the inspections should comport with industry standards or Appendix B, the industry standards should govern.

5. Spill Prevention Response Plan

WVONGA urges DEP to add Well Site Safety Plans (WSSP) after the term "Groundwater Protection Plan" in § 4.2 as a plan that would be considered equivalent to SPRPs for the initial December 3, 2014 submission. Like GPPs, they are submitted with permit applications, reviewed, and approved by the agency before permit issuance. Like SPRPs, WSSPs must be site specific, encompass all aspects of the operation, available on site, and provide an emergency point of contact and 24-hour contact information for the well operator. These plans must also be provided to the local emergency planning committee and/or local office of emergency services, and the operator is required to work closely with local first responders to familiarize them with the site, potential hazards, and the plan itself. Finally, WSSPs require that MSDS for all materials and chemicals on the well site be readily available and maintained on site, and that the plan identify the location of the MSDS and contact information for the person(s) responsible for maintaining them. In light of the similarity between WSSPs and SPRPs and the inefficiency that would result from requiring our operators to reinvent the wheel in a relatively short period of time, we ask that you consider this addition to the list of plans you will consider sufficient as submission of SPRPs by December 3, 2014.

APENDIX C (sic) requires a Spill Prevention Response Plan to identify applicable hazard and process information including the following: "A list (name and Chemical Abstract Service number) of all fluids stored in ASTs..." The ASTs containing fracturing fluids used for gas shale stimulations consist primarily of water but also include a variety of additives. The number of chemical additives used in a typical fracture treatment varies depending on the conditions of the specific well. A typical fracture treatment will use very low concentrations of between 3 and 12 additive chemicals depending on the characteristics of the water and the target shale formation. WVONGA urges the agency to allow incorporation by reference of fracturing fluid information as filed with well work permit applications.

Also in APPENDIX C, with regard to the Site Maps/Drawings, WVONGA seeks agency clarification that this does not require survey quality drawings, and that sketches showing the relevant information are appropriate. Requiring survey quality drawings of all property boundaries, streets, waterways, ASTs, buildings, drainage pipes, water outlets, monitoring and observation wells, legend and scale would be cost prohibitive for many existing AST locations where this level of detail is not already available, and is unnecessary for the purpose of the SPRP.

In addition, we also request that DEP clarify what level of consultation is necessary for regulated facilities and the Bureau of Public Health ("BPH") and county and municipal authorities with respect to SPRP development. For those Level 2 and 3 ASTs that are required to comply, we suggest that sending a copy of such plans to the BPH and county and municipal emergency management agencies should be sufficient for purposes of satisfying this requirement.

October 9, 2014

RE: AST Interpretive Rule Comments

We appreciate the WVDEP's efforts to expand opportunities for input on the AST rule making process. Our members and citizens at large often wonder if our interests and voices matter to policy decision making, especially when it comes to environmental protection. It is meaningful to see the extra steps the Agency is taking in involving public input.

It was highly disconcerting for citizens to hear that industry groups were mounting political pressure to push back deadlines for the initial submission of spill plans and certified inspections. It was not what the public needed to hear to restore confidence that their water supplies were going to be any more protected than they were on January 9, 2014. We are glad that the Governor and the Secretary recognized there must be a better, safer solution than delaying protective measures.

The interpretive rule is a compromise. We are glad that it maintains implementation deadlines, assuring the public that spill plans and inspections are getting done sooner than later. We regret that all initial inspections will not be completed by third party professional engineers. We acknowledge that that rule making is still a work in progress, and the Agency has made substantial efforts to assist tank owners with compliance in the form of interim guidance, online resources and extra staffing to provide on call technical assistance.

So it is in the spirit of compromise that, in general, we support the interpretive rule. It gives tank owners flexibility to meet these requirements in a more time efficient and cost efficient manner. It gives the public some peace of mind that DEP can get the job done and that industry is answering the call for diligence and accountability owed to the public to minimize risk of contamination events.

We offer the following technical comments on the interpretive rule:

1. We recommend that the Level 1 AST definition be consistent with the definition in the rough draft emergency rule. It should be revised so that ASTs containing hazardous substances on the "Lists of Lists" (not just CERCLA) be automatically classified as Level 1

2. We recommend that the Secretary use the AST registration database to immediately assess and identify ASTs that do not automatically fit the Level 1 definition, but still pose a significant risk, and use his discretionary authority laid out in the rule to classify them as Level 1. Examples to consider include tanks just outside of a zone of critical concern, tanks containing harmful substances that are not on the List of Lists such as MCHM, or tanks that are not in a zone of critical concern but are in very close proximity to surface waters.

Thank you for your consideration of these comments.

Angie Rosser

Executive Director

West Virginia Rural Water Association

100 Young Street • Scott Depot, WV 25560-7839 • 304/201-1689

October 3, 2014

Mr. Randy C. Huffman, Secretary
West Virginia Department of Environmental Protection
601 - 57th Street
Charleston, WV 25304

RE: Title 47 Interpretive Rule, Series 62, Initial Inspection, Certification, and Spill Prevention

Dear Mr. Secretary:

These comments are submitted jointly by the West Virginia Municipal League and the West Virginia Rural Water Association. As you know, the membership of these two groups includes the majority, if not all, of the publicly-owned water utilities serving our citizens.

Please recall that the League and Association jointly submitted to DEP comments regarding SB 373 rulemaking. That submission is enclosed for your convenient reference, and we continue to look forward to working with the agency in the Legislative rulemaking process.

From those comments, please note that treated water storage tanks are already registered with and regulated by the West Virginia DHHR, Bureau for Public Health ("BPH"); and, that water storage tank designs are evaluated and approved by BPH prior to construction; and, that routine water distribution practice includes real-time, constant monitoring of tank levels; and, that there is no record of catastrophic failure of water storage tanks in our State; and, finally, that, even in the unlikely event of a catastrophic failure, discharge of treated water from these tanks would not present a threat to human health.

We find that the proposed Interpretive Rule is consistent with these facts and is consistent with the focus and stated purpose of SB 373. The Rule presents a common sense approach that recognizes the inherently low risk of failure of water storage tanks.

and, in the highly unlikely event of such a failure, the innocuous effect of leaking drinking water upon human health.

We are concerned that conflicting language in the proposed Rule may introduce confusion and regulatory uncertainty:

> 47-62.2.2. defines a Level 1 tank as one with a "…capacity of 50,000 gallons or more, regardless of its location or contents…" (emphasis added)
>
> 47-62.2.4 allows a Level 3 classification when a tank is deemed to have the "… potential for low risk of harm … due to its contents…"

Read together, these sections appear to exempt water storage tanks over 50,000 gallons from a Level 3 classification.

To eliminate this conflict, and to classify all water storage tanks as Level 3, we propose the following amendment:

47-62.2.2 "Level 1 AST" means an AST that is determined by the Secretary to have the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264. Except as provided in Sections 2.3 and 2.4, an AST that meets any of the following criteria is a Level 1 AST:

Thank you for the opportunity to submit comments. We look forward to continuing the vitally important work of protecting our source water.

Sincerely,

Amy L. Swann, Executive Director
West Virginia Rural Water Association

Lisa Dooley, Executive Director
West Virginia Municipal League

Enclosure

West Virginia Rural Water Association

100 Young Street • Scott Depot, WV 25560-7839 • 304/201-1689

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WV DEPARTMENT OF ENVIRONMENTAL PROTECTION
EXECUTIVE OFFICE

May 14, 2014

Mr. Randy C. Huffman, Secretary
West Virginia Department of Environmental Protection
601 - 57th Street
Charleston, WV 25304

RE: SB 373 Rulemaking

Dear Mr. Secretary:

These comments are submitted jointly by the West Virginia Municipal League and the West Virginia Rural Water Association. As you know, the membership of these two groups includes the majority, if not all, of the publicly-owned water utilities serving our citizens.

We acknowledge that Senate Bill 373 exempts water storage tanks only from the permit requirements of WV Code §22-30-5, and that the inventory, registration, prevention and response sections of the bill may apply to every above-ground storage tank ("AST") in West Virginia, including water tanks.

As you consider the comments included below, please recall that: (1) Treated water storage tanks are already registered with and regulated by the West Virginia DHHR, Bureau for Public Health ("BPH"); and, (2) That water storage tank designs are evaluated and approved by BPH prior to construction; and, (3) That our ratepayers are already paying for source water protection efforts as a cost of public water service, and that those costs are increasing; and, (4) That routine water distribution practice includes real-time, constant monitoring of tank levels; and, (5) That there is no record of catastrophic failure of water storage tanks in our State; and, (6) That, even in the unlikely event of a catastrophic failure, discharge of treated water from these tanks would not present a threat to human health.

We believe that these facts show that agency resources would be most efficiently deployed by relying upon work already done by BPH regulation of water tanks, and focus DEP's regulatory efforts upon ASTs other than water storage tanks. To that end, we will discuss with legislative leadership an amendment to the AST Act that would exempt water storage tanks from many of the provisions included in the Act. Until that amendment is effected, we rely upon the agency and rulemaking to ensure that regulation of drinking water storage tanks is efficient and coherent.

1. WV Code §22-30-4: Exempt publicly-owned, treated drinking water storage tanks from the DEP registration process, including the registration fee/administrative fund. Every water storage tank in service to a public utility is already registered by the BPH. This information should be shared between the two agencies so that the regulated public utility would not be forced to perform and pay for duplicative regulatory tasks. Using the BPH data would most efficiently meet the Legislative intent of identifying and locating these storage tanks.

2. WV Code §22-30-6: Exempt publicly-owned, treated drinking water storage tanks from the annual inspection requirement. BPH inspects these facilities as part of their sanitary survey program at a frequency dependent upon the raw water source (every three or five years). This information should be shared between the two agencies so that the regulated public utility would not be forced to perform and pay for duplicative regulatory tasks.

3. WV Code §22-30-7: Exempt publicly-owned water utilities from the financial responsibility reporting requirements of this section. Because the financial strength of a public utility is the prerogative of local government and is further regulated by the Public Service Commission, DEP oversight regarding fiscal matters is both improper and unnecessarily duplicative.

4. WV Code §22-30-9: Exempt publicly-owned water utilities complying with BPH Source Water Protection requirements from the spill prevention response plan requirements of this section. The Source Water Protection program includes and exceeds the requirements included in this section. Therefore, a regulated utility required to meet both program requirements would be forced to perform and pay for duplicative and perhaps inconsistent regulatory tasks.

5. WV Code §22-30-12 and 13: Exempt publicly-owned utilities from both the Administrative Fund and the Protect Our Water Fund. Public utility ratepayers are already paying significant costs to protect their water supply, including costs to meet the inventory, information management, planning, response and protection

requirements of the law. The additional assessments would require these ratepayers to pay again for a service that is already included in their water rate.

Water ratepayers of public utilities – in fact, the owners of these utilities - do not enjoy a return on investment as do private businesses using ASTs for profit. Fees paid by ratepayers of a public utility are drawn directly from the disposable income of our citizens, with no profit or gain to offset the expense. Because our ratepayers are already suffering risks and increased costs as a result of the shortcomings of privately owned ASTs, it would be unfair and unconscionable to assess yet another cost upon these citizens. Funding for the DEP program should come solely from the private businesses using ASTs for profit.

6. Given the critical impact of time on any spill, a state owned and operated data base where above ground storage tank owners could upload the MSDS information for their specific above ground storage tanks should be implemented. The data base should be built so that above ground storage tank owners can access the data at any time.

7 The proposed rules must provide that West Virginia water utilities must be contacted first when any spill occurs. This contact can be made by telephone or fax. It must occur within 15 minutes from the time the spill became known by the owner of the aboveground storage tank.

8. The proposed rules should clearly delineate cross state lines responsibilities where an aboveground storage tank located in another state can pose a threat to the water supply of a West Virginia water utility.

Thank you for the opportunity to submit comments. We look forward to working with you as Senate Bill 373 is implemented.

Sincerely,

Amy L. Swann

Amy L. Swann, Executive Director
West Virginia Rural Water Association

Cc: Lisa Dooley, Executive Director
West Virginia Municipal League

West Virginia State Board of Registration
for Professional Engineers

304-558-3554 Phone
304-558-6232 Fax
800-324-6170 Toll Free

www.wvpebd.org

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OCT - 1 2014
WV DEPARTMENT OF ENVIRONMENTAL PROTECTION
EXECUTIVE OFFICE

September 29, 2014

Randy C. Huffman, Cabinet Secretary
Department of Environmental Protection
601 57th Street, Southeast
Charleston, West Virginia

Re: Implementation of SB373

Dear Secretary Huffman:

During its regular meeting on September 15, 2014, the WV State Board of Registration for Professional Engineers ("the WV PE Board") had a brief discussion regarding the interpretive rule now out for public comment.

The WV PE Board appreciates the Legislature's recognition of the important role of licensed professional engineers in protecting thc health and safety of our citizens, which is reflected in this agency's proposed interpretive rulc regarding the initial inspection and certification of Level 1 ASTs.

However, it is difficult to provide meaningful comment since the contemplated process for your determination of Level 2 and Level 3 ASTs is not set forth, and it is unknown whether these categories will only be utilized for the initial inspection and certification or will also apply to the annual inspection and certification required by W. Va. Code § 20-30-6. If the Secretary is authorized to make a determination of Level 2 and Level 3 ASTs as defined in § 47-62-2.3 and 2.4 of the proposed Interpretative Rule, the contemplated process for such a determination is not described. This is obviously an important point to the WV PE Board since the requirement that a licensed professional engineer or other specified professional perform the initial inspection and certification becomes, in effect, an in-house inspection for Level 2 and Level 3 ASTs.

Similarly, it is unclear whether these categories will also apply to the annual inspections and certifications required by W.Va. Code § 20-30-6. The WV PE Board understands the significant time restraints you are working under and request that it be notified of the filing of legislative rules, including emergency rules, on this and other sections of the new Article 30.

Also please keep us apprised of the process by which you intend to make your Level 1, 2 and 3 determinations. The WV PE Board would appreciate an opportunity to review and comment upon this process prior to its implemcntation.

Sincerely,

Edward L. Robinson, P.E.
Board President

West Virginia Surface Owners' Rights Organization
1500 Dixie Street, Charleston, WV 25311
(304) 346-5891 - FAX: (304) 346-8981
www.wvsoro.org

October 9, 2014

Randy Huffman, Secretary
WV Department of Environmental Protection
c/o Public Information Office
601 57th Street S.E.
Charleston, WV 25304

Re: Comments on Aboveground Storage Tank Act (AST Act) Interpretive Rule §47 CSR 62

Dear Secretary Huffman,

The West Virginia Surface Owners' Rights Organization (WV-SORO) appreciates the opportunity to comment on the Department's interpretive rule addressing initial inspection, certification and spill prevention response plan requirements for Aboveground Storage Tanks (ASTs) in West Virginia. WV-SORO is a statewide membership organization representing over 900 members, all of whom live or own land in the state's oil and gas producing counties. As surface owners where oil and gas exploration and production occurs, we are particularly concerned about the above ground storage tanks of the oil and gas industry.

While we have some concerns about the interpretive rule that we address in the section specific comments that, in general, we support the interpretive rule as a reasonable compromise to assist tank owners in meeting pending deadlines for submitting Spill Prevention Response Plans (SPRPs) and completing inspections and certifications without changing or extending the dates specified in SB 373. We appreciate the efforts DEP has taken to ensure these deadlines are met and to include the public in the development of the AST Act rules. The risk-based approach of the interpretive rule is a practical approach to assist tank owners with compliance without delaying implementation of the important public safety measures mandated by the Act.

The following comments are in the order in which the subject appears in the rule and are not an indication of their relative importance to the WV-SORO.

§47-62-2. Definitions

We support a Level 1 tank classification that is protective of the environment and public health, and ask that the definition used in the interpretive rule be revised to match the definition in the rough draft emergency rule. The definition in the emergency rule includes all of the substances on "the List of Lists" rather than a subset of the List, and is therefore more protective of our water resources.

We also support the Secretary's ability to redesignate tanks as Level 1. The Secretary should use the registration database to immediately identify ASTs that do not automatically fit the Level 1 definition, but pose a significant risk, and use his discretionary authority to classify them as Level 1.

Additionally, we would encourage the DEP not to exempt storage of food-grade fracking materials or non-contact cooling water that may use chemical treatment from the Level 1 or Level 2 classifications. Instead, we encourage DEP to use a risk-based approach in classifying tanks containing these substances.

§47-62-3. Initial Inspection and Certification

A major concern we have regarding the interpretive rule is that it will allow self-inspections for many of the ASTs owned and operated by the oil and gas industry, the majority of which are likely to be classified as Level 2. While this approach is preferable to delaying the first round of inspections it is less than ideal.

A review of tank related violations issued by the WV DEP Office of Oil and Gas over the past 10 years (August 1, 2004 through August 1, 2014) (see attached), clearly demonstrates that tanks at oil and gas well sites are a threat to waters of the state of West Virginia. Additionally, our analysis suggests that that the OOG's reliance on operator self-inspections of storage tanks and secondary containment is ineffective at preventing the types of incidents documented in the WV DEP Oil and Gas database.

Moving forward, we need to make sure adequate accountability measures are in place for inspections and spill plans. This means having someone other than the owner doing inspections periodically on a regular basis to ensure these tanks are sound.

§47-62-4. Initial Spill Prevention Response Plans

We suggest that Section 4.3 of the interpretative rule be revised as follows:

4.3. The owner or operator of a Level 2 AST who is required to maintain on-site ~~Spill Prevention Plans pursuant to 35 CSR 1 or~~ Spill Prevention, Control, and Countermeasures Plans pursuant to 40 C.F.R. § 112 may submit the ~~applicable~~ plan to the Secretary in lieu of the SPRP by December 3, 2014. The Secretary may request additional information, if necessary, in order to ensure that such plans conform with the requirements of W. Va. Code § 22-30-9. Alternatively, the owner or operator may submit a site specific SPRP that, at a minimum, conforms to the requirements set forth in Appendix C and in accordance with W. Va. Code § 22-30-9 by December 3, 2014.

35 CSR 1.9 requires a Spill Prevention Plan if an operator of an oil or gas well has already "discharged more than 1,000 U.S. gallons into the waters of the state in a reportable discharge", or discharged pollutants into the waters of the state in not one but "in two reportable discharges within any twelve month period." In other words, the "plan" is more an enforcement document, providing a description of the cause of the spill, submission of the SPCC Plan, and corrective actions/countermeasures taken. Additionally, there is no requirement in 35 CSR 1.9 plan on site. As a result, we venture to say that there are many SPCC plans that are not written, and therefore many sites with little or no spill prevention control, or countermeasures. ‘

While technical in nature, our suggested changes in light of the inherent weakness of 35 CSR 1, which we outlined in detail in our May 15, 2014 comments regarding what we would like to see in the AST Act rules. As previously stated, we are very concerned at how weak the Spill Prevention, Control and Countermeasures Act (SPCC Act) regulations are that implement the SPCC Act for oil and gas exploration and production in West Virginia. These tanks "represent a substantial threat of contamination" and the West Virginia SPCC regulations for oil and gas exploration and production blatantly do NOT "meet or exceed the protective standards and requirements set forth in" the AST Act.

Conclusion

Despite our concerns, we view the interpretive rule as a practical step in implementing the important public safety measures mandated by SB 373 and we support the DEP's risk based approach to give owners and operators of ASTs flexibility in compliance, while still protecting our water resources.

Thank you for the opportunity to comment on the interpretive rule and for actively including the public and considering their input in the development of this and the other rules governing the implementation of the AST Act.

Sincerely,

/s/Julie Archer (Intended as a signature)

Julie Archer, Project Manager
1500 Dixie Street
Charleston, WV 25311
(304) 346-5891
julie@wvsoro.org

Analysis of Storage Tank Violations at WV Oil and Gas Well, 2004-2014

Prepared by Julie Archer and George Monk for
the WV Surface Owners' Rights Organization (WV-SORO) and
the WV Chapter of the Sierra Club

Introduction

Recent proposals from legislators and industry groups have suggested exempting storage tanks at oil and gas wells from inventory and inspection requirements in SB 373, which contains the Aboveground Storage Tank Act and the Public Water Supply Protection Act. Justification for the proposed exemptions includes, among other reasons, the ideas that these tanks are already strongly regulated and inspected by WVDEP Office of Oil and Gas (OOG) and that few of the tanks are near streams. To provide information on these ideas, we retrieved and analyzed records of violations related to storage tanks that OOG has issued during the last ten years.

Analysis and results

Oil and gas violation data were retrieved for all of West Virginia for the last 10 years (August 1, 2004 through August 1, 2014), from the WVDEP Oil and Gas database (https://apps.dep.wv.gov/oog/svsearch_new.cfm?pageType=viol). Notices of Violation (NOVs) related to tanks were identified by filtering two fields, the WV Code/Regulation and Comments fields, for reference to 35 CSR 1.7, the oil and gas rule that governs standards for tanks and spill prevention at oil and gas wells. Sixty-five tank violations were identified. Each NOV that was issued was identified with a unique violation code, and tank violations were typically issued in connection with other violations. NOVs were matched by date and American Petroleum Institute (API) number, and for the purpose of this analysis, all NOVs issued on the same date at the same well were considered to be a single incident. Sixty-three unique incidents were identified at 59 different wells. A total of 132 NOVs were issued in the 63 tank-related incidents. Of the four wells with NOVs issued on more than one date, two of the NOVs were extensions for abatement, but the other two were NOVs issued at the same well in different years.

These 132 NOVs were filtered by the WV Code/Regulation and Comments fields for reference to §22-11-8 and §22-6-7 of the W.Va. Code, both of which address polluting waters of the state. Thirty-four water-related violations were identified during 30 of the 63 incidents. Multiple NOVs were issued at 42 of the wells. The maximum number of NOVs in an incident was seven, for an incident in May 2014 in Harrison County.

The number of incidents increased from 2009 through 2011, and has fluctuated since then (Figure 1). The maximum number of incidents (14) has been in 2014, although this number only represents incidents through August. The total number of NOVs issued during tank-related enforcement incidents more than tripled from 2010 to 2011, remained above the previous baseline during 2012 and 2013, and has increased further during 2014 (Figure 2).

Completion dates were downloaded from the WV Geologic and Economic Survey (WVGES) (http://www.wvgs.wvnet.edu/oginfo/pipeline/pipeline2.asp). For eight of the wells, completion

dates were unavailable in WVGES data. Other information, such as gas production or permit dates were available from WVDEP OOG to allow an estimate of the completion date for seven of them. For some of the wells, the target formation was identified. Seventeen of the 59 wells targeted the Marcellus Shale.

Thirty-seven of the 65 tank violations were at wells drilled before 2007, when horizontal drilling began in West Virginia; of these, 33 were at wells drilled before 2000. Twenty-one of the water violations were at wells drilled before 2007; of these, 17 were at wells drilled before 2000. Most of the incidents from wells drilled since 2007 were in counties where horizontal drilling of the Marcellus or Lower Huron Shales is common.

Discussion

The database and data analysis procedure has resulted in an imperfect count of tank- or containment-related enforcement activities at oil and gas wells. For instance, because the definition of "incident" relies on activities carried out for unique combinations of API number and date, the previously mentioned abatement extensions were counted as separate incidents. However, if spills and other tank-related incidents were entered into the violation database with typographic errors in the WV Code field, they were not identified and counted. Also, at least one oil spill to a stream in Kanawha County caused by a faulty valve on a tank resulted in enforcement activities that did not include a tank violation.[1] This and similar enforcement activities were not identified and counted in this analysis.

Although some of the NOVs issued for spills were for active horizontal-well sites, many were for conventional wells, and in some cases quite old wells. This is problematic, because although active horizontal-well sites are inspected by the WVDEP, existing conventional wells are not. Because existing oil and gas wells are not routinely inspected by the WVDEP, all these violations had to have been either reported by companies or members of the public, or discovered during inspection of new work at the site. The database does not identify how spills or other violations were discovered by WVDEP, although in cases where an NOV was issued for failure to report a spill, the spill was probably discovered and reported by a member of the public. Our experience suggests that problems at well sites are underreported for a variety of reasons, including reluctance on the part of the surface owners to confront the gas producers and unfamiliarity with reporting procedures. We suggest, therefore, that the number of NOVs is an extremely conservative measure of problematic storage tanks associated with oil and gas wells.

Many of the tank-related incidents were not associated with an NOV related to polluting the waters of the state. These incidents may or may not have occurred at wells far from a stream. At about half (30 of 63) the wells where tank-related NOVs were issued, NOVs were issued for polluting the waters of the state. These violations likely all represent incidents when spilled material entered a stream, and quite likely, incidents which could have been prevented by rigorous inspection and maintenance procedures.

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[1] DEP Issues Violations to Black Crow Oil, WV DEP press release, September 31, 2011, http://www.dep.wv.gov/news/Pages/DEPissuesviolationstoBlackCrowOil.aspx.

The post-2010 increase in numbers of NOVs, combined with a higher percentage of incidents apparently at active sites and in places where horizontal drilling is common, may represent an appropriate emphasis on inspecting active drilling sites, but might also indicate that spills have become more frequent as well sizes and the volumes of fracking fluid and flowback have increased and handling practices have changed. Similarly, the increase in tank-related NOVs in 2014 likely represents heightened awarencss of spills in general in the aftermath of the January spill to Elk River from Freedom Industries. However, increased activity at new well sites and increased inspection of these active sites will do absolutely nothing to slow deterioration of old tanks at existing wells. The number of tank-related enforcement incidents at such sites demonstrates that these tanks remain a threat to waters of the state of West Virginia. It is our view that this threat is sufficient reason to proceed with the planned inspection of tanks at oil and gas wells in West Virginia.

Additionally, our analysis suggests that that the OOG's reliance on operator self-inspections of storage tanks and secondary containment is ineffective at preventing these types of incidents. The DEP's risk based interpretive rule will allow self-inspections for many of these tanks in an effort to assist operators in meeting upcoming deadlines in SB 373. While this approach is preferable to delaying the first round of inspections it is less than ideal. Even if the motivation for the passage of SB 373 was a spill into the source stream for a public water supply, a positive if unintended consequence is that it has the potential to improve the inspection and maintenance of tanks that affect or could affect groundwater and the individual rural landowners who rely on private watcr wells for drinking and other uses. Moving forward, we need to make sure adequate accountability measures are in place for inspections and spill plans. This means having someone other than the owner doing inspections periodically on a regular basis to ensure these tanks are sound.

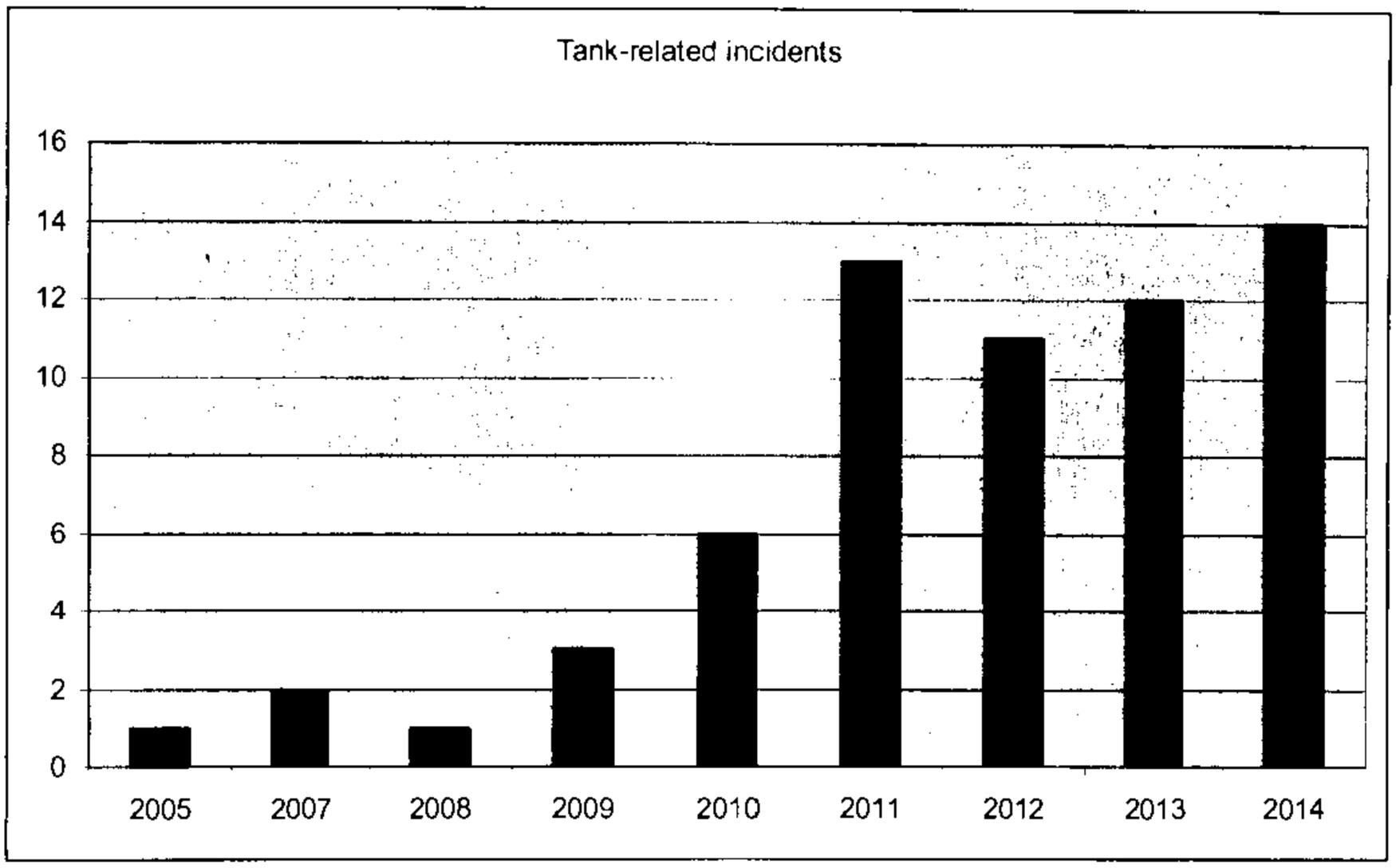

Figure 1. Enforcement incidents for which tank-related Notices of Violation were issued by WVDEP Office of Oil and Gas, August 2004 through August 2014, by calendar year.

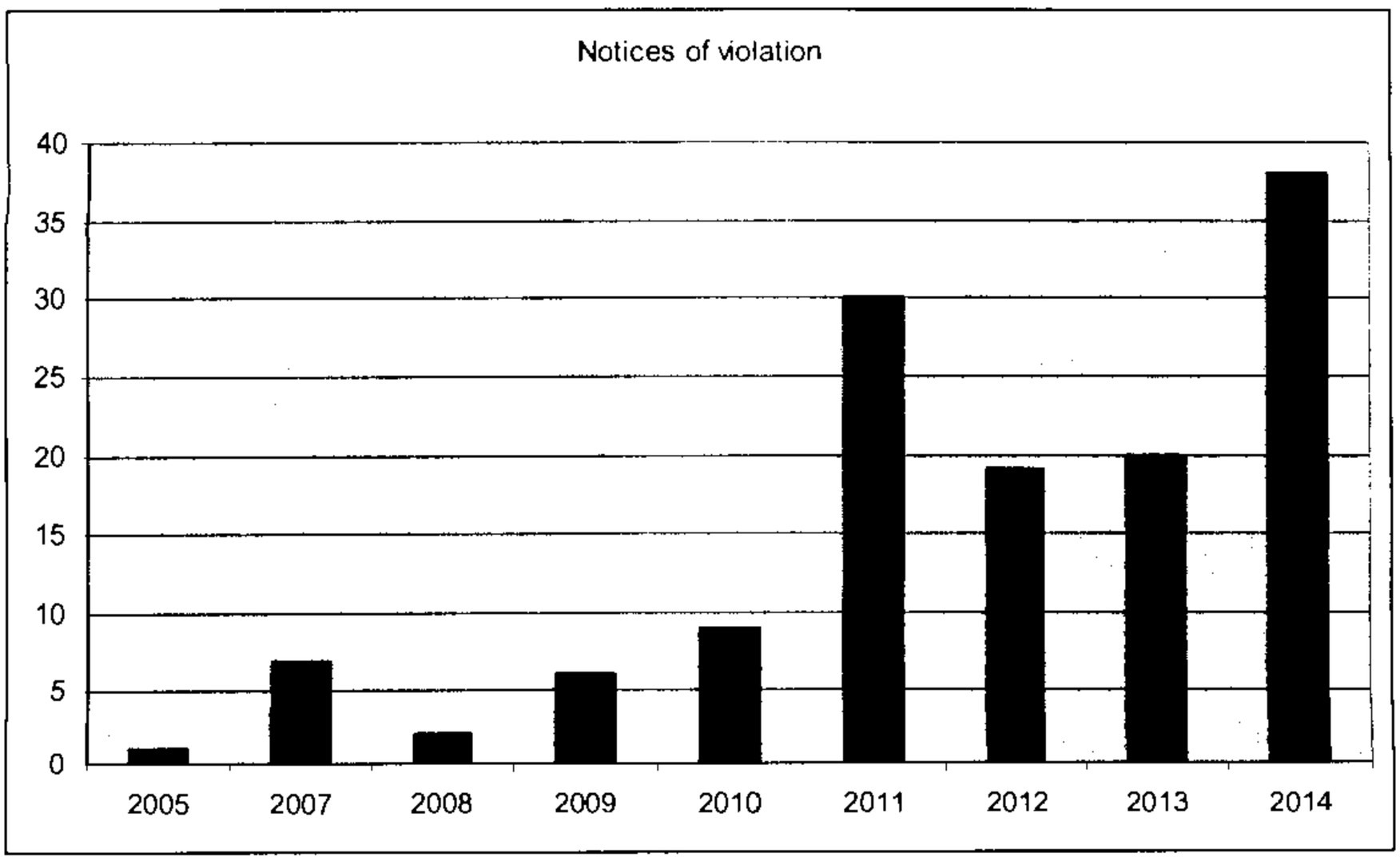

Figure 2. Total numbers of Notices of Violation issued by WVDEP Office of Oil and Gas during tank-related enforcement incidents, August 2004-August 2014, by calendar year.

ViolationID	ViolationDate	API	Permit type	IncidentID	Year	CompYear
7475	11/9/2005	085-05174	OTHRW	1	2005	1981
7675	6/6/2007	087-01063	OTHRW	2	2007	1964
7670	6/6/2007	087-01063	OTHRW	2	2007	1964
7671	6/6/2007	087-01063	OTHRW	2	2007	1964
7672	6/6/2007	087-01063	OTHRW	2	2007	1964
7673	6/6/2007	087-01063	OTHRW	2	2007	1964
7674	6/6/2007	087-01063	OTHRW	2	2007	1964
7682	6/27/2007	021-02513	OTHRW	3	2007	1974
8072	6/5/2008	099-02117	PARTP	4	2008	2004
8073	6/5/2008	099-02117	PARTP	4	2008	2004
8094	5/28/2009	033-04996	NEWEL	5	2009	2008
8093	5/28/2009	033-04996	NEWEL	5	2009	2008
8277	9/10/2009	041-00757	OTHRW	6	2009	1961
8274	9/10/2009	041-00757	OTHRW	6	2009	1961
8295	11/2/2009	039-05652	NEWEL	7	2009	2005
8294	11/2/2009	039-05652	NEWEL	7	2009	2005
8372	4/6/2010	047-00554	OTHRW	8	2010	1973
8369	4/12/2010	039-05636	NEWEL	9	2010	2003
8370	4/12/2010	039-05636	NEWEL	9	2010	2003
8371	4/16/2010	055-00410	NEWEL	10	2010	2010
8374	4/22/2010	055-00319	NEWEL	11	2010	2007
8375	4/22/2010	055-00319	NEWEL	11	2010	2007
8426	8/8/2010	011-00695	OTHRW	12	2010	1981
8463	12/23/2010	039-04903	ASSPN	13	2010	1916
8462	12/23/2010	039-04903	ASSPN	13	2010	1916
8532	4/4/2011	007-02539	NEWEL	14	2011	2007
8533	4/4/2011	007-02539	NEWEL	14	2011	2007
8556	6/8/2011	017-02416	NEWEL	15	2011	1971
8555	6/8/2011	017-02416	NEWEL	15	2011	1971
8557	6/8/2011	017-02416	NEWEL	15	2011	1971
8554	6/8/2011	017-05880	NEWEL	16	2011	2009
8552	6/8/2011	017-05880	NEWEL	16	2011	2009
8553	6/8/2011	017-05880	NEWEL	16	2011	2009
8565	7/5/2011	085-07652	OTHRW	17	2011	1988
8564	7/5/2011	085-07652	OTHRW	17	2011	1988
8613	8/12/2011	021-05731	REWOR	18	2011	2011
8612	8/12/2011	021-05731	REWOR	18	2011	2011
8659	8/25/2011	021-03271	PLUG	19	2011	1921
8660	8/25/2011	021-03271	PLUG	19	2011	1921
8588	8/25/2011	103-02502	HORIW	20	2011	2009
8592	8/25/2011	103-02502	HORIW	20	2011	2009
8591	8/25/2011	103-02502	HORIW	20	2011	2009
8589	8/25/2011	103-02502	HORIW	20	2011	2009
8605	9/7/2011	061-01623	HORIW	21	2011	2012
8606	9/7/2011	061-01623	HORIW	21	2011	2012
8603	9/7/2011	061-01623	HORIW	21	2011	2012
8607	9/7/2011	061-01623	HORIW	21	2011	2012
8656	11/1/2011	039-03946	OTHRW	22	2011	1983
8655	11/1/2011	039-03946	OTHRW	22	2011	1983
8666	11/10/2011	017-05918	HORIW	23	2011	2011
8664	11/15/2011	079-00727	OTHRW	24	2011	1967

8663	11/15/2011	079-00727	OTHRW	24	2011	1967
8671	12/15/2011	051-01396	HORIW	25	2011	2011
8675	12/16/2011	005-01424	OTHRW	26	2011	1984
8676	12/16/2011	005-01424	OTHRW	26	2011	1984
8687	2/28/2012	039-04683	OTHRW	27	2012	1989
8686	2/28/2012	039-04683	OTHRW	27	2012	1989
8704	3/7/2012	047-01652	NEWEL	28	2012	2001
8703	3/7/2012	047-01652	NEWEL	28	2012	2001
8728	4/23/2012	039-06171	ASSPN	29	2012	2008
8727	4/23/2012	039-06171	ASSPN	29	2012	2008
8729	4/23/2012	039-06171	ASSPN	29	2012	2008
8730	4/23/2012	039-06171	ASSPN	29	2012	2008
8741	5/29/2012	077-00503	HORIW	30	2012	2010
8744	5/29/2012	077-00503	HORIW	30	2012	2010
8745	6/1/2012	017-05970	HORIW	31	2012	2011
8749	6/4/2012	039-04907	FRACT	32	2012	1920
8747	6/4/2012	039-06324	NEWEL	33	2012	2012
8748	6/4/2012	039-06325	NEWEL	34	2012	2013
8760	7/24/2012	085-02888	OTHRW	35	2012	1964
8761	7/24/2012	085-02888	OTHRW	35	2012	1964
8785	12/12/2012	039-03333		36	2012	#N/A
8786	12/12/2012	039-03333		36	2012	#N/A
8783	12/12/2012	087-01618	OTHRW	37	2012	1967
8828	3/7/2013	033-01780	NEWEL	38	2013	1950
8858	3/18/2013	015-02883		39	2013	2012
8857	3/18/2013	015-02883		39	2013	2012
8860	3/26/2013	051-01393	HORIW	40	2013	2010
8866	4/9/2013	009-00136		41	2013	2013
8875	4/30/2013	001-03265		42	2013	2010
8874	4/30/2013	001-03265		42	2013	2010
8873	4/30/2013	001-03266		43	2013	2012
8872	4/30/2013	001-03266		43	2013	2012
8878	5/17/2013	009-00089	HORIW	44	2013	2011
8890	5/21/2013	055-00319	NEWEL	45	2013	2007
8886	6/24/2013	039-06349		46	2013	2013
8939	10/2/2013	033-04084	NEWEL	47	2013	1995
8940	10/2/2013	033-04084	NEWEL	47	2013	1995
8941	10/2/2013	033-04084	NEWEL	47	2013	1995
8944	10/3/2013	039-00963	OTHRW	48	2013	1942
8942	10/3/2013	039-00963	OTHRW	48	2013	1942
8943	10/3/2013	039-00963	OTHRW	48	2013	1942
8950	10/25/2013	033-01748	OTHRW	49	2013	1988
8951	10/25/2013	033-01748	OTHRW	49	2013	1988
8984	2/19/2014	019-00508	OTHRW	50	2014	1982
8987	2/27/2014	019-00460	OTHRW	51	2014	1981
8988	2/27/2014	019-00460	OTHRW	51	2014	1981
8989	2/27/2014	019-00508	OTHRW	52	2014	1982
8990	2/27/2014	019-00508	OTHRW	52	2014	1982
8992	3/5/2014	039-02210	OTHRW	53	2014	1968
8995	3/7/2014	017-03226	OTHRW	54	2014	1983
8996	3/7/2014	017-03226	OTHRW	54	2014	1983
8997	3/7/2014	017-03226	OTHRW	54	2014	1983

8998	3/7/2014	017-03226	OTHRW	54	2014	1983
8999	3/7/2014	017-03226	OTHRW	54	2014	1983
8993	3/10/2014	049-02250		55	2014	2013
8994	3/10/2014	049-02250		55	2014	2013
9039	4/30/2014	039-03603	OTHRW	56	2014	1980
9040	4/30/2014	039-03603	OTHRW	56	2014	1980
9042	5/12/2014	073-01828	OTHRW	57	2014	1984
9043	5/12/2014	073-01828	OTHRW	57	2014	1984
9047	5/20/2014	093-00056	OTHRW	58	2014	1982
9045	5/20/2014	093-00056	OTHRW	58	2014	1982
9046	5/20/2014	093-00056	OTHRW	58	2014	1982
9052	5/21/2014	033-05550	HORIW	59	2014	2012
9053	5/21/2014	033-05550	HORIW	59	2014	2012
9050	5/21/2014	033-05550	HORIW	59	2014	2012
9051	5/21/2014	033-05550	HORIW	59	2014	2012
9054	5/21/2014	033-05550	HORIW	59	2014	2012
9058	5/27/2014	033-05550	HORIW	60	2014	2012
9059	5/27/2014	033-05550	HORIW	60	2014	2012
9091	7/8/2014	017-01444	OTHRW	61	2014	1967
9092	7/8/2014	017-01444	OTHRW	61	2014	1967
9093	7/8/2014	017-01444	OTHRW	61	2014	1967
9101	7/29/2014	001-00191	REWOR	62	2014	1964
9100	7/29/2014	001-00191	REWOR	62	2014	1964
9105	7/30/2014	087-01618	OTHRW	63	2014	1967
9107	7/30/2014	087-01618	OTHRW	63	2014	1967
9102	7/30/2014	087-01618	OTHRW	63	2014	1967
9103	7/30/2014	087-01618	OTHRW	63	2014	1967
9104	7/30/2014	087-01618	OTHRW	63	2014	1967
9106	7/30/2014	087-01618	OTHRW	63	2014	1967

Operator	WVCodeRegulation
ZICKEFOOSE, R. L. AND W.F.	35csr.1.7.2
OPERATOR UNKNOWN	35.1.7.5
OPERATOR UNKNOWN	35.4.0.3a
OPERATOR UNKNOWN	35.4.10.2
OPERATOR UNKNOWN	35.4.5.5.a
OPERATOR UNKNOWN	22.6.19
OPERATOR UNKNOWN	35.4.15.
AAA ENERGY INC	35.1.7
TARGET OIL & GAS CORP	22.6.7 /35.1.7
TARGET OIL & GAS CORP	22.6.19
WACO OIL & GAS CO INC	35.1.7.1
WACO OIL & GAS CO INC	22.6.7.1
UNION GAS CORP. (UNION GAS CO.)	35.1.7
UNION GAS CORP. (UNION GAS CO.)	35.6
NORTHSTAR ENERGY CORPORATION	35.1.7.2
NORTHSTAR ENERGY CORPORATION	22.6.7
EQT PRODUCTION COMPANY	22.6.3/35.1.7
NORTHSTAR ENERGY CORPORATION	22.6.7/35.1.7
NORTHSTAR ENERGY CORPORATION	22.6.7
DOMINION EXPLORATION & PRODUCTION	22.6.7/35.1.7
CAMP CREEK DISPOSAL SERVICES, INC.	35csr1 7.1
CAMP CREEK DISPOSAL SERVICES. INC.	47csr13 19.a.1
BIG C PRODUCTION & PROCESSING INC	35-1-7.1.a
BLACK CROW OIL, LLC	35.1.7.14
BLACK CROW OIL, LLC	22.6.7
CHESAPEAKE APPALACHIA, L.L.C.	35.1.7.1
CHESAPEAKE APPALACHIA, L.L.C.	22..6.7.6.1
HG ENERGY, LLC	35.1.7.1
HG ENERGY, LLC	22.6.7.61
HG ENERGY, LLC	35.1.3.1
HALL DRILLING, LLC	35-1-7.1
HALL DRILLING, LLC	22-6-7(b)(1)
HALL DRILLING, LLC	22-6-30(A)
JAY-BEE OIL & GAS	35.1.71a
JAY-BEE OIL & GAS	22.6.7
DOMINION TRANSMISSION INC	35.1.7.1
DOMINION TRANSMISSION INC	22.6.7.61
MOUNTAIN COUNTRY PARTNERS, LLC	35.1.7.1
MOUNTAIN COUNTRY PARTNERS, LLC	22.6.7.61
JAY-BEE OIL & GAS	22.6.7(6)(1)
JAY-BEE OIL & GAS	22.6.2235.4.12.
JAY-BEE OIL & GAS	35.1.7.1
JAY-BEE OIL & GAS	35.1.3.1
CHESAPEAKE APPALACHIA, L.L.C.	35.4.16.3
CHESAPEAKE APPALACHIA, L.L.C.	35.1.7.1
CHESAPEAKE APPALACHIA, L.L.C.	22.6.7.b.1
CHESAPEAKE APPALACHIA, L.L.C.	22.6.6.d
EXCO RESOURCES (PA), LLC	35.1.7.19
EXCO RESOURCES (PA), LLC	22.6.7
EQT PRODUCTION COMPANY	22.6.3-35.1.7.1
VIKING ENERGY CORPORATION	35-1-7-19

VIKING ENERGY CORPORATION	22-6-7
GASTAR EXPLORATION USA, INC.	35.1.7.1
CABOT OIL & GAS CORPORATION	35.1.7.1
CABOT OIL & GAS CORPORATION	22.6.7
CHESAPEAKE APPALACHIA, L.L.C.	35-1-7.1
CHESAPEAKE APPALACHIA, L.L.C.	22-6-7
NORTHPORT PRODUCTION COMPANY	35-1-7
NORTHPORT PRODUCTION COMPANY	22-6-13(e)
3 R PIPELINE, INC.	35-1-7.1
3 R PIPELINE, INC.	22-11-8(b)(1)
3 R PIPELINE, INC.	35-1-3.1
3 R PIPELINE, INC.	22-6-32
CHIEF OIL & GAS, LLC	35-1-7.1
CHIEF OIL & GAS, LLC	22-6-30a
JAY-BEE OIL & GAS	35.1.7.5
RAVEN RIDGE ENERGY	35.1.7.1a
RAVEN RIDGE ENERGY	35.1.7.1a
RAVEN RIDGE ENERGY	35.1.7.1a
POSTROCK EASTERN PRODUCTION LLC	35.1.7.1a
POSTROCK EASTERN PRODUCTION LLC	22-6-7b1
C. I. MCKOWN & SON, INC.	35 csr 1.7.1a
C. I. MCKOWN & SON, INC.	22-11-8b-a
MOUNTAIN COUNTRY PARTNERS, LLC	47/13/13.1.a
HG ENERGY, LLC	22-6-7
RAVEN RIDGE ENERGY	35.1.7.1a
RAVEN RIDGE ENERGY	22-6-7
CHIEF OIL & GAS, LLC	35.1.7.7
CHESAPEAKE APPALACHIA, L.L.C.	22-6-7
MOUNTAINEER KEYSTONE, LLC	35.1.7.1
MOUNTAINEER KEYSTONE, LLC	35.1.3.1
MOUNTAINEER KEYSTONE, LLC	35.1.7.1
MOUNTAINEER KEYSTONE, LLC	35.1.3.1
CHESAPEAKE APPALACHIA, L.L.C.	35.1.7.7.8
CAMP CREEK DISPOSAL SERVICES, INC.	35.1.7.1
RAVEN RIDGE ENERGY	35.1.7.1d
COW RUN LTD LIABILITY COMPANY	35-1-7a
COW RUN LTD LIABILITY COMPANY	35-1-7.2
COW RUN LTD LIABILITY COMPANY	22-6-7
FRAME & LEANY RESOURCES	35-1-7.1
FRAME & LEANY RESOURCES	22-6-6-13d
FRAME & LEANY RESOURCES	22-11-8b-1
HG ENERGY, LLC	35-1-7
HG ENERGY, LLC	22-6-7
DANNY E WEBB CONSTRUCTION INC	35-1-7.1
DANNY E WEBB CONSTRUCTION INC	35-1-7.1
DANNY E WEBB CONSTRUCTION INC	35-4-16.4.a
DANNY E WEBB CONSTRUCTION INC	35-1-7.1
DANNY E WEBB CONSTRUCTION INC	34-4-16.4.a
VIKING ENERGY CORPORATION	35 csr 1.7.1
FARROW, SAMUEL JR	35-1-7.1.a
FARROW, SAMUEL JR	22-6-3.a
FARROW, SAMUEL JR	22-6-6.e.

FARROW, SAMUEL JR	22-6-7.1
FARROW, SAMUEL JR	22-6-3.a
TRANS ENERGY, INC.	35-1-7.1
TRANS ENERGY, INC.	22-6-3a
EXCO RESOURCES (PA), LLC	35 csr 1.7.1a
EXCO RESOURCES (PA), LLC	22-6-7
MOUNTAINEER GAS TRANSMISSION INC	22-6-7/35-1-7.1
MOUNTAINEER GAS TRANSMISSION INC	22-6-6-13e
DRI OPERATING COMPANY	35-1-7.5
DRI OPERATING COMPANY	35-4-5.5.a
DRI OPERATING COMPANY	35-4-15
ANTERO RESOURCES CORPORATION	35 csr 1.7.1d
ANTERO RESOURCES CORPORATION	35 csr 1.7.1a
ANTERO RESOURCES CORPORATION	35 csr 4.16.2
ANTERO RESOURCES CORPORATION	35 csr 4.16.3
ANTERO RESOURCES CORPORATION	22-6-7b-1
ANTERO RESOURCES CORPORATION	35 CSR 1.7.1A
ANTERO RESOURCES CORPORATION	22-6-7B-1
ALEXANDER PRODUCTION COMPANY	35 csr 1.7.1a
ALEXANDER PRODUCTION COMPANY	35 csr 5.5a
ALEXANDER PRODUCTION COMPANY	22-6-7.1
COMMONWEALTH ENERGY INC	22-6-2
COMMONWEALTH ENERGY INC	22-6-2
MOUNTAIN COUNTRY PARTNERS, LLC	22-6-2
MOUNTAIN COUNTRY PARTNERS, LLC	22-6-2
MOUNTAIN COUNTRY PARTNERS, LLC	22-6-2
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CleanCode
35.1.7.2
35.1.7.5
35.4.0.3a
35.4.10.2
35.4.5.5.a
22.6.19
35.4.15.
35.1.7
22.6.7./35.1.7
22.6.19
35.1.7.1
22.6.7.1
35.1.7
35.6
35.1.7.2
22.6.7
22.6.3/35.1.7
22.6.7/35.1.7
22.6.7
22.6.7/35.1.7
35.1.7.1
47.13.19.a.1
35.1.7.1.a
35.1.7.14
22.6.7
35.1.7.1
22.6.7.6.1
35.1.7.1
22.6.7.61
35.1.3.1
35.1.7.1
22.6.7(b)(1)
22.6.30(A)
35.1.71a
22.6.7
35.1.7.1
22.6.7.61
35.1.7.1
22.6.7.61
22.6.7(6)(1)
22.6.2235.4.12.
35.1.7.1
35.1.3.1
35.4.16.3
35.1.7.1
22.6.7.b.1
22.6.6.d
35.1.7.19
22.6.7
22.6.3.35.1.7.1
35.1.7.19

22.6.7
35.1.7.1
35.1.7.1
22.6.7
35.1.7.1
22.6.7
35.1.7
22.6.13(e)
35.1.7.1
22.11.8(b)(1)
35.1.3.1
22.6.32
35.1.7.1
22.6.30a
35.1.7.5
35.1.7.1a
35.1.7.1a
35.1.7.1a
35.1.7.1a
22.6.7b1
35.1.7.1a
22.11.8b.a
47/13/13.1.a
22.6.7
35.1.7.1a
22.6.7
35.1.7.7
22.6.7
35.1.7.1
35.1.3.1
35.1.7.1
35.1.3.1
35.1.7.7.8
35.1.7.1
35.1.7.1d
35.1.7a
35.1.7.2
22.6.7
35.1.7.1
22.6.6.13d
22.11.8b.1
35.1.7
22.6.7
35.1.7.1
35.1.7.1
35.4.16.4.a
35.1.7.1
34.4.16.4.a
35.1.7.1
35.1.7.1.a
22.6.3.a
22.6.6.e.

22.6.7.1
22.6.3.a
35.1.7.1
22.6.3a
35.1.7.1a
22.6.7
22.6.7/35.1.7.1
22.6.6.13e
35.1.7.5
35.4.5.5.a
35.4.15
35.1.7.1d
35.1.7.1a
35.4.16.2
35.4.16.3
22.6.7b.1
35.1.7.1A
22.6.7B.1
35.1.7.1a
35.5.5a
22.6.7.1
22.6.2
22.6.2
22.6.2
22.6.2
22.6.2
22.6.2
22.6.2
22.6.2

Comments
LEAK IN DIKE
TANK DYKE SYSTEM
AGENT
BONDING
API TAGS
PLUG OR PRODUCE
ANNUAL PROD
DIKE, PIT
REMOVE TANK & WASTE
PLG WELL
INSTAL DIKE
POLLUTING WATERS SALT WATER
REBUILD DKES
AB
DIKE DRAINS CLOSED & SEALED
POLLUTING EATERS
FIX DIKE AND TANK API #
FIX DIKES
POLLUTIG WATERS
POLLUTING WATERS
MUST HAVE APPROPRIATE SECONDARY CONTAINMENT WITH STORAGE TANKS.
NOT MEETING TERMS OF PERMIT FOR SECURITY.
NO DIKES, BERMS, NOR SECONDARY CONTAINMENT DEVICES.
DIKE BERMS
POLLUTING WATERS
NEED APPROPTIATE CONTAINMENT
POLLUTANTS TO WATERS OF THE STATE
NEED CONTANMENT
POLLUTING WATERS
RPT SPILLS IN 24HRS
INADEQUATE SECONDARY CONTAINMENTS ENGLANDS RUN TANK FACILITY. ABATED
POLLUTION OF WATERS OF THE STATE (CEASE ORDER ISSUED ENGLANDS RUN TAN
FAILURE OF WELL SITE RECLAMATION WITHIN REQUIRED TIME DEADLINES. ABATED
DIKE PROBLEMS
REMOVE POTENTIAL POLLUTANTS FROM SITE
APPROPIATE CONTAINMENT
REPAIR LEAK & CONTAINMENT

REMOVE CONTAMINATED SOIL
FILE WR 35
INSTALL CONTAINMENT
RPT SPILL
PREVENT RUN OFF CARRYING SEDIMENT
INAPPROPRATE CONTAINMENT AND SEDIMENT CONTROLS
PREVENT SURFACE RUN OFF FLOWING TO WATERS
EROSION AND SEDIMENT CONTROL
CLEAN UP DIKE
CLEAN SOILS
CHEMICAL SPILL
MAKE DIKE IMPERVIOUS

HAUL TANK OFF OR FIX DIKE
INSTALL CONTAINMENT AROUND TANK
MAKE DIKE IMPERVIOUS
CLEAN OI FROM SURFACE
IMPROPER CONTAINMENT OF POLLUTANTS 2ND EXTENDING ABATEMENT ISSUED ON
POLLUTION OF THE WATERS OF THE STATE 2ND EXTENDING ABATEMENT ISSUED OI
IMPROPER SECONDARY CONTAINMENT AND PREVENTING WASTE
NO DESIGNATED AGENT
INADEQUATE CONTAINMENTS AND DIVERSIONARY STRUCTURES.
POLLUTANTS TO THE WATERS OF THE STATE.
SPILL NOTIFICATION REQUIREMENTS NOT FOLLOWED.
WASTE OF NATURAL GAS.

OPERATIONS W/O PERMIT AND FAILURE TO RENEW UIC PERMIT #D0871618
AND 35.1.7.1

ALSO 35.1-7.7.8 ABATEMENT DATE EXTENDED TIL 05/13/2013
EXT. GRANTED TIL 6/6/13
EXT. GRANTED TIL 6/6/13
EXT GRANTED TIL 6/6/13
EXT GRANTED TIL 6/6/13
FAILURE TO MAINTAIN SEPARATOR EQUIPMENT
NOTICE EXTENDING ABATE TIME TIL 06/29/2013

ABATEMENT TIME EXT. TO 12/22/13
ABATEMENT TIME EXT. TO 12/22/13
ABATEMENT TIME EXT. TO 12/22/13

ANNULLED VIOLATION PER ORDER 2013-83
ANNULLED VIOLATION PER ORDER 2013-83

SECONDARY CONTAINMENT INTEGRITY COMPROMISED, CEASE OPERATIONS LIFTED
INADEQUATE CONTAINMENT FOR PUMP STATION AND PUMPS.
INADEQUATE SPILL PREVENTION MEASURES IN EXISTING PITS.
INADEQUATE CONTAINMENT FOR PUMP STATION AND PUMPS.
INADEQUATE SPILL PREVENTION MEASURES FOR EXISTING PITS.
ABATE TIME EXT.
INADEQUATE DIKES, BERMS AND TANK CONTAINMENTS
IMMINENT DANGER EXISTS
MUST HAVE PROPER AGENT ACCORDING TO CODE

MUST NOT ALLOW POLLUTANTS IN THE WATERS OF THE STATE
CEASE ORDER ISSUED BY INSPECTOR - MUST ABATE ALL VIOLATIONS
FAILURE TO HAVE ADEQUATE SECONDARY CONTAINMENTS
IMMINENT DANGER EXISTS ALSO CODE 35 CSR 4 SECTION5.5A (API ID)
ABATE TIME EXT TO 06/06/14
ABATE TIME EXT TO 06/06/14
POLLUTION TO WATERS OF THE STATE CEASE OPERATIONS ORDER ISSUED BY INSF
NO AGENT
FINDINGS OF NO TANK SECONDARY CONTAINMENTS (TWO TANKS)
FINDINGS OF NO API ID ON WELL OR WELLSITE
FINDINGS OF NO PRODUCTION REPORTS FILED WITH OFFICE OF OIL AND GAS
ISSUED TO SHALEWATER SOLUTIONS, INADEQUATE MAINTENANCE.
ISSUED TO SHALEWATER SOLUTIONS, SECONDARY CONTAINMENT MUST BE IMPERV
ISSUED TO ANTERO RES., INADEQUATE WELL SITE-ACCESS MAINTENANCE.
ISSUED TO ANTERO RES., INADEQUATE DRILL SITES MAINENTANCE.
ISSUED TO ANTERO RES., POLLUTION OF THE WATERS OF THE STATE.
ISSUED TO SHALEWATER SOLUTIONS, IMPROPER CONTAINMENT.
ISSUED TO SHALEWATER SOLUTIONS, POLLUTION OF THE WATERS OF THE STATE.

ALSO 35CSR SERIES 1.7.2
ALSO 35CSR SERIES 4.15
ALSO 35CSR SERIES 1.7.1
ALSO 35CSR SERIES 1.7.6
ALSO 35CSR SERIES 4.7.7B
ALSO 35CSR SERIES 4.8.4B.3
ALSO 35CSR SERIES 1.3.1
ALSO 35CSR SERIES 1.3.2

Officer	County	AbateDueBy	FailuretoAbateDate	AbateDate
STEVE MOSSOR	Ritchie	11/16/2005		12/13/2005
Ed Gainer	Roane	06/13/2007		08/07/2008
Ed Gainer	Roane	06/13/2007		08/07/2008
Ed Gainer	Roane	06/13/2007		08/07/2008
Ed Gainer	Roane	06/13/2007		08/07/2008
Ed Gainer	Roane	06/13/2007		08/07/2008
Ed Gainer	Roane	06/13/2007		08/07/2008
David Gilbert	Gilmer	07/04/2007		07/10/2007
GARY SCITES	Wayne	06/12/2008		10/09/2008
GARY SCITES	Wayne	06/12/2008		06/12/2008
TIM BENNETT	Harrison	06/04/2009		05/29/2009
TIM BENNETT	Harrison	06/04/2009		05/28/1996
TIM BENNETT	Lewis	09/17/2009		11/17/2009
TIM BENNETT	Lewis	09/17/2009		11/17/2009
Terry Urban	Kanawha	11/09/2009		12/10/2009
Terry Urban	Kanawha	11/09/2009		12/10/2009
Gary Kennedy	McDowell	04/13/2010		04/20/2010
Terry Urban	Kanawha	04/19/2010		04/21/2010
Terry Urban	Kanawha	04/19/2010		04/21/2010
Gary Kennedy	Mercer	04/23/2010		04/13/2010
Dave Belcher	Mercer	04/29/2010		09/22/2010
Dave Belcher	Mercer	04/29/2010		09/22/2010
Ralph Triplett	Cabell	08/15/2010		08/16/2010
Terry Urban	Kanawha	12/30/2010	01/06/2011	
Terry Urban	Kanawha	12/30/2010	01/06/2011	
Joe McCourt	Braxton	04/11/2011		04/21/2011
Joe McCourt	Braxton	04/11/2011		04/21/2011
Joe McCourt	Doddridge	06/15/2011		08/12/2011
Joe McCourt	Doddridge	06/15/2011		08/12/2011
Joe McCourt	Doddridge	06/15/2011		08/12/2011
Dave Belcher	Doddridge	06/15/2011		12/23/2011
Dave Belcher	Doddridge	06/15/2011		12/23/2011
Dave Belcher	Doddridge	06/15/2011		12/23/2011
David Cowan	Ritchie	07/12/2011		07/18/2011
David Cowan	Ritchie	07/12/2011		07/18/2011
Joe McCourt	Gilmer	08/19/2011		09/15/2011
Joe McCourt	Gilmer	08/19/2011		09/15/2011
Joe McCourt	Gilmer	09/01/2011		11/01/2011
Joe McCourt	Gilmer	09/01/2011		11/01/2011
Derek Haught	Wetzel	09/01/2011		09/28/2011
Derek Haught	Wetzel	09/01/2011		09/28/2011
Derek Haught	Wetzel	09/01/2011		09/28/2011
Derek Haught	Wetzel	09/01/2011		09/28/2011
Sam Ward	Monongalia	09/14/2011		09/20/2011
Sam Ward	Monongalia	09/14/2011		09/20/2011
Sam Ward	Monongalia	09/14/2011		09/20/2011
Sam Ward	Monongalia	09/14/2011		09/20/2011
Terry Urban	Kanawha	11/08/2011		01/05/2012
Terry Urban	Kanawha	11/08/2011		01/05/2012
David Cowan	Doddridge	11/17/2011		12/02/2011
Jamie Stevens	Putnam	11/22/2011		06/11/2013

Jamie Stevens	Putnam	11/22/2011	06/11/2013
Derek Haught	Marshall	12/22/2011	02/24/2012
Terry Urban	Boone	12/23/2011	02/17/2012
Terry Urban	Boone	12/23/2011	02/17/2012
Terry Urban	Kanawha	03/06/2012	07/03/2012
Terry Urban	Kanawha	03/06/2012	07/03/2012
Gary Kennedy	McDowell	03/14/2012	09/17/2012
Gary Kennedy	McDowell	03/14/2012	04/29/2013
Terry Urban	Kanawha	04/30/2012	08/28/2012
Terry Urban	Kanawha	04/30/2012	08/28/2012
Terry Urban	Kanawha	04/30/2012	09/03/2012
Terry Urban	Kanawha	04/30/2012	07/25/2012
Sam Ward	Preston	06/05/2012	07/03/2012
Sam Ward	Preston	06/05/2012	05/29/2012
David Scranage	Doddridge	06/08/2012	06/01/2012
Terry Urban	Kanawha	06/11/2012	07/03/2012
Terry Urban	Kanawha	06/11/2012	07/03/2012
Terry Urban	Kanawha	06/11/2012	07/03/2012
David Cowan	Ritchie	07/31/2012	08/03/2012
David Cowan	Ritchie	07/31/2012	08/03/2012
Terry Urban	Kanawha	12/19/2012	
Terry Urban	Kanawha	12/19/2012	
Dave Belcher	Roane	12/19/2012	01/22/2013
Jackie Thornton	Harrison	03/14/2013	03/14/2013
Ed Gainer	Clay	03/25/2013	04/09/2013
Ed Gainer	Clay	03/25/2013	04/12/2013
Bill Hendershot	Marshall	04/02/2013	04/02/2013
Gayne Knitowski	Brooke	04/16/2013	05/09/2013
Joe McCourt	Barbour	05/07/2013	06/06/2013
Joe McCourt	Barbour	05/07/2013	06/06/2013
Joe McCourt	Barbour	05/07/2013	06/06/2013
Joe McCourt	Barbour	05/07/2013	06/06/2013
Gayne Knitowski	Brooke	05/24/2013	06/04/2013
Gary Kennedy	Mercer	05/28/2013	06/19/2013
Terry Urban	Kanawha	07/01/2013	06/27/2013
Sam Ward	Harrison	10/09/2013	
Sam Ward	Harrison	10/09/2013	
Terry Urban	Kanawha	10/10/2013	10/10/2013
Terry Urban	Kanawha	10/10/2013	10/10/2013
Terry Urban	Kanawha	10/10/2013	11/01/2013
Sam Ward	Harrison	11/01/2013	11/12/2013
Sam Ward	Harrison	11/01/2013	11/12/2013
Terry Urban	Fayette	02/26/2014	02/24/2014
Terry Urban	Fayette	03/06/2014	05/21/2014
Terry Urban	Fayette	03/06/2014	06/10/2014
Terry Urban	Fayette	03/06/2014	06/10/2014
Terry Urban	Fayette	03/06/2014	05/21/2014
Terry Urban	Kanawha	03/12/2014	06/11/2014
Douglas Newlon	Doddridge	03/14/2014	
Douglas Newlon	Doddridge	03/14/2014	
Douglas Newlon	Doddridge	03/14/2014	

Douglas Newlon	Doddridge	03/14/2014		
Douglas Newlon	Doddridge	03/14/2014	03/07/2014	
Bill Hendershot	Marion	03/17/2014		03/08/2014
Bill Hendershot	Marion	03/17/2014		03/08/2014
Terry Urban	Kanawha	05/07/2014		05/15/2014
Terry Urban	Kanawha	05/07/2014		05/15/2014
Joe Taylor	Pleasants	05/19/2014	05/19/2014	
Joe Taylor	Pleasants	05/19/2014	05/19/2014	
Kenneth Greynolds	Tucker	05/27/2014		07/08/2014
Kenneth Greynolds	Tucker	05/27/2014		
Kenneth Greynolds	Tucker	05/27/2014		
Sam Ward	Harrison	05/28/2014		05/27/2014
Sam Ward	Harrison	05/28/2014		05/27/2014
Sam Ward	Harrison	05/28/2014		05/28/2014
Sam Ward	Harrison	05/28/2014		05/28/2014
Sam Ward	Harrison	05/28/2014		05/27/2014
Sam Ward	Harrison	06/03/2014		05/27/2014
Sam Ward	Harrison	06/03/2014		05/27/2014
Douglas Newlon	Doddridge	07/15/2014		
Douglas Newlon	Doddridge	07/15/2014		
Douglas Newlon	Doddridge	07/15/2014		
Kenneth Greynolds	Barbour	08/05/2014		08/01/2014
Kenneth Greynolds	Barbour	08/05/2014		08/01/2014
Ed Gainer	Roane	08/06/2014		
Ed Gainer	Roane	08/06/2014		
Ed Gainer	Roane	08/06/2014		
Ed Gainer	Roane	08/06/2014		
Ed Gainer	Roane	08/06/2014		
Ed Gainer	Roane	08/06/2014		

ViolationCloseDate	OriginalSort	TankViolations	WaterViolations
	3751	1	
	3289	1	
	3291		
	3293		
	3281		
	3283		
	3285		
	3269	1	
	2981	1	1
	2985		
	2207	1	
	2205		1
	1767	1	
	1761		
	1715	1	
	1713		1
	1611	1	
	1595	1	1
	1597		1
	1577	1	1
	1563	1	
	1561		
	1487	1	
	1413	1	
	1415		1
	1283	1	
	1279		1
	1231	1	
	1229		1
	1239		
	1237	1	
	1233		1
	1235		
	1201	1	
	1203		1
	1165	1	
	1167		1
	1151	1	
	1147		1
	1145		1
	1159		
	1155	1	
	1153		
	1115		
	1117	1	
	1121		1
	1119		
	1023	1	
	1021		1
	1011	1	
	995	1	

	997		1
	975	1	
02/17/2012	971	1	
02/17/2012	973		1
	941	1	
	943		1
	927	1	
	925		
	843	1	
	845		1
	847		
	849		
	827	1	
	821		
	811	1	
	803	1	
	809	1	
	807	1	
	779	1	
	775		1
	733	1	
	731		1
	725		
	649	1	1
	577	1	
	575		1
	567	1	
	559	1	1
	553	1	
	547		
	551	1	
	549		
	541	1	
	537	1	
	505	1	
	427	1	
	429	1	
	431		1
	421	1	
	423		
	425		1
	401	1	
	399		1
	311	1	
	291	1	
	301		
	293	1	
	295		
	287	1	
	275	1	
	277		
	273		

279		1
281		
271	1	
269		
191	1	
193		1
185	1	1
183		
165	1	
169		
167		
159	1	
157	1	
153		
151		
155		1
143	1	
145		1
59	1	
63		
61		1
37	1	
41		
27	1	
13	1	
15		
19		
23		
33		

October 7, 2014

West Virginia Department
of Environmental Protection
Public Information Office
AST Interpretive Rule Comments
601 57th Street, SE
Charleston, WV 25304

The following comments are provided in the name of the Water Utility Council (WUC) of the West Virginia Section of the American Water Works Association (WV AWWA).

Where the term Public Water System (PWS), or any variation thereof, is used below, it refers to operators of potable water utilities of all kinds, regardless of whether the utility is publicly or privately owned, and regardless of whether that utility treats/produces its own water or purchases it from another water utility.

The WUC of the WV AWWA supports the proposed Interpretive Rule and appreciates the efforts of WV DEP in drafting and proposing the Rule. We believe that in proposing to rank potable water storage tanks as Level 3, the DEP has found the proper balance between the requirements of SB 373 and the recognition that PWS's pose little threat to the water sources which we hold so dear.

We appreciate that, with the Level 3 designation, DEP has proposed reasonable requirements applying to tank inspections and spill prevention response plans for facilities owned and operated by PWS's.

However, we are concerned that an apparent conflict within the language of the Interpretive Rule may cause confusion, and could potentially undermine the DEP's intent for water storage tanks to be ranked as Level 3.

Section 47-62-2.2.e defines a Level 1 Tank as: "An AST with a capacity of 50,000 gallons or more, regardless of location or contents..." This language arguably conflicts with Section 47-62-2.4 which defines a Level 3 tank as "...an AST that is determined by the Secretary to have the potential for low risk of harm to public health or the environment due to its contents, size or location, or because the AST is subject to strict regulations, including regular inspections, under another program (i.e., AST's containing potable water, filtered surface water,..."

Read strictly, the effect of 47-62-2.2.c could be interpreted that only potable water tanks under 50,000 gallons would be considered Level 3.

DEP has already issued an informal email addressing this apparent conflict, and clarifying that "Potable water tanks are level 3 ASTs regardless of size".

We respectfully suggest confirmation of the informal clarification, by enacting the following change to **§47-62-2(2.2)**:

> 2.2. "Level 1 AST" means an AST that is determined by the Secretary to have the potential for high risk of harm to public health or the environment due to its contents, size or location, except for ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, or hazardous waste tanks subject to regulation under 40 C.F.R. § 264. Except as provided in Sections 2.3 and 2.4, an ~~An~~ AST that meets any of the following criteria is a Level 1 AST:

Thank you for your important work, and for considering these comments.

Respectfully,

WATER UTILITY COUNCIL
WV SECTION
AMERICAN WATER WORKS ASSOCIATION

Timothy L. Ball, P.E.
Chairman

JACKSONKELLY
ATTORNEYS AT LAW PLLC

500 LEE STREET EAST • SUITE 1600 • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-340-1000 • TELECOPIER: 304-340-1130
www.jacksonkelly.com

Direct Dial No.: (304) 340-1290
Facsimile No.: (304) 340-1272
Email: jsnyder@jacksonkelly.com

October 9, 2014

VIA HAND DELIVERY

West Virginia Department of Environmental Protection
Public Information Office
AST Interpretive Rule Comments
601 57th Street, SE
Charleston, WV 25304

Enclosed is an original:

Comments of Go-Mart, Inc. and St. Marys Refining Company to
Title 47
Interpretive Rule
Department of Environmental Protection
Division of Water and Waste Management
Series 62
Initial Inspection, Certification, and Spill Prevention
Response Plan Requirements Under W. Va. Code §§ 22-30-6 and 22-30-9

Very truly yours,

JAMES R. SNYDER

JRS:sms

Enclosure

COMMENTS OF GO-MART, INC. AND ST. MARYS REFINING COMPANY
TO
TITLE 47
INTERPRETIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT

SERIES 62
INITIAL INSPECTION, CERTIFICATION, AND SPILL PREVENTION
RESPONSE PLAN REQUIREMENTS UNDER W.VA. CODE §§ 22-30-6 AND 22-30-9

This comment is submitted on behalf of Go-Mart, Inc. and St. Marys Refining Company (SMRC). Go-Mart, Inc. operates a petroleum distribution terminal for gasoline and diesel fuel located in St. Albans, West Virginia. SMRC operates a similar terminal in St. Marys, West Virginia. Both terminals are subject to the requirements of Section 311 of the federal Clean Water Act (CWA), as amended by the Oil Pollution Act of 1990 (OPA). Implementing regulations found at 40 C.F.R. § 112 *et seq.* set forth the Spill Prevention Control and Countermeasure Requirements, including a requirement that a covered facility prepare a spill prevention control and countermeasures plan (SPCC plan). Each terminal has aboveground storage tanks which have been registered with WVDEP. Go-Mart and SMRC both have SPCC plans which have been submitted to and approved by the United States Environmental Protection Agency (EPA).

1. Go-Mart and SMRC suggest that for purposes of the Interpretative Rule, ASTs not located in a Zone of Critical Concern and subject to SPCC plans should be treated as Level 3 ASTs because in the words of the interpretative rule such ASTs are "subject to strict regulations, including regular inspections, under another program".

The plain language of SB 373 supports this conclusion. Section 22-30-25(a) of the bill provides that certain ASTs "shall be required to participate in the inventory and registration process . . . [but] shall not be required to be permitted . . . either because they do not

represent a substantial threat of contamination, or they are currently regulated under standards which meet or exceed the protective standards and requirements set forth in this article." Among the tanks falling within this classification are: ". . . Aboveground storage tanks for which spill prevention, control, and countermeasure plans are required by the Environmental Protection Agency (EPA) under 40 CFR Part 112 (oil pollution prevention), unless located within a zone of critical protection". W. Va. Code § 22-30-25(a)(9).

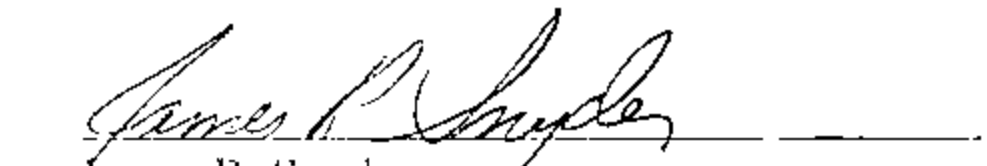
Given the legislative determination that ASTs covered by SPCC plans are sufficiently regulated under 40 C.F.R. Part 112, a Level 3 designation is appropriate. In fact, application of the rules of statutory construction indicates that the legislature intended only for the inventory and registration requirements to apply to such tanks. *State ex rel. City of Charleston v.* Hutchinson, 176 S.E.2d 691, (W.Va. 1970) (applying the rule of expressio unis est exclusion alterious – the express motion of one thing implies the exclusion of another).

The legislature's determination is supported by a review of EPA's SPCC regulations. In summary, these regulations impose Spill Prevention Control and Countermeasures requirements ("SPCC") to prevent "oil" entering waters through the prevention, control and mitigation of oil spills at facilities such as storage and distribution terminals. Specific requirements for aboveground tanks and containers, include among other things, "sufficiently impervious" secondary containment, fencing and security and the inspection of the tanks. SPCC plans also contain operating procedures to prevent oil spills, control measures to prevent a spill from reaching navigable waters, remedial measures to contain, cleanup and mitigate the effects of an oil spill that reaches waters. SPCC Plans are certified by a professional engineer. The SPCC regulations are enforceable by the United States Environmental Protection Agency.

The suggested revision may be accomplished by amending Section 2.4 of the Rule as follows:

> 2.4. "Level 3 AST" means an AST that is determined by the Secretary to have the potential for low risk of harm to public health or the environment due to its contents, size or location or because the AST is subject to strict regulations, including regular inspections, under another program (i.e., ASTs containing potable water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, food or food-grade materials, tanks for which a spill prevention control and countermeasures plan is required by 40 C.F.R. Part 112 and which are not located in a Zone of Critical Concern or hazardous waste tanks subject to regulation under W. Va. Code § 22-18-1, *et seq.* and 40 C.F.R. § 264).

2. The interpretative rule should make clear that certifications are not required for "non-operational tanks" since by definition they will not hold fluids in the future. Similarly, the rule should make clear that these tanks are not required to be included in Spill Prevention Response Plans. Similar treatment should be accorded to tanks which are "temporarily out-of-service" until such time as they are brought into service.



James R. Snyder
Jackson Kelly PLLC
Counsel for Go-Mart, Inc. and St. Marys Refining Company