

BEFORE THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN RE:

ABOVEGROUND STORAGE TANK
PROGRAM DRAFT INTERPRETIVE RULE

HELD OCTOBER 9, 2014

6:30 P.M.

Dena A. Belisle
Certified Court Reporter

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A P P E A R A N C E S

ON BEHALF OF THE DEP:

KELLEY J. GILLENWATER
Public Information Office

P R O C E E D I N G S

1 MS. GILLENWATER: Good evening. I'm Kelley
2 Gillenwater. I'm with the Department of
3 Environmental Protection's Public Information Office.
4 I am your facilitator for tonight's public hearing to
5 discuss the DEP's aboveground storage tank program
6 draft interpretive rule. Can everybody hear me,
7 because I wasn't going to use this unless I needed
8 to.

9 Also here this evening from the DEP are
10 Pat Campbell, Ruth Porter and Joe Sizemore. Can you
11 guys raise your hands? They are with the DEP's
12 Division of Water and Waste Management. The three-
13 and-a-half page draft interpretive rule is meant to
14 provide temporary guidance to tank owners and
15 operators whose tanks must be regulated by the DEP as
16 required by Senate Bill 373, which passed the West
17 Virginia Legislature on March 8th.

18 These are tanks that have the capacity
19 to hold 1,320 gallons or more of liquid, are 90
20 percent or more above ground and are at a fixed
21 location for at least 60 days.

22 The draft interpretive rule details the
23 DEP's plan to classify tanks into three risk

1 categories based on contents, location and size. It
2 also provides guidance to tank owners on the
3 requirements for spill prevention response plans,
4 which are to be submitted by December 3rd, and tank
5 certifications which are due on January 1st.

6 The interpretive rule is meant to be a
7 temporary rule. It would expire in June or upon its
8 replacement with a more comprehensive rule. This
9 rule is not to be confused with the more detailed
10 emergency rule, a rough draft of which has been
11 disseminated to the public for feedback. Comments on
12 the rough draft of the emergency rule will be
13 accepted through October 24th.

14 The purpose of tonight's hearing is to
15 give you the opportunity to share your comments about
16 the draft interpretive rule. Tonight's hearing is
17 being recorded by a Court Reporter so that the
18 comments shared can be taken into consideration and
19 responded to before the interpretive rule is
20 finalized.

21 To ensure that we successfully achieve
22 the purpose of this hearing, we ask that everyone be
23 respectful and considerate by refraining from
24 interrupting others while they are speaking, and

1 keeping your comments on topic, so that our time
2 together is used efficiently.

3 For those of you wishing to speak, when
4 I call you to provide your comments, please come up
5 to the front, state your name and any organization
6 that you are here to represent. If you have written
7 comments that you would like to submit in addition to
8 your spoken comments, please hand them to me or to
9 another DEP employee after you speak, or at the
10 conclusion of the hearing. If nobody has any
11 questions about the hearing format, we will go ahead
12 with the speaker portion. No questions. Sir?

13 UNIDENTIFIED SPEAKER: I have a question
14 about the global tanks which remain in one location
15 for less than 60 days. Do we have any -- or can we
16 obtain any knowledge about the contents of those
17 tanks whether they might be hazardous or not. I
18 realize there's an industry or proprietary secrets,
19 or rule or whatever you want to call it. What my
20 concern is, what can we do about those tanks?

21 MS. GILLENWATER: Well, unfortunately, all
22 that we are regulating under this program are tanks
23 that are considered permanent, those that are at a
24 fixed location for 60 days or more. That would be a

1 matter for discussion perhaps with the Legislature or
2 at another meeting. But again, our purpose for
3 tonight's meeting is to strictly focus on the three-
4 and-a-half page interpretive rule, and to keep our
5 time here as effective and efficient as possible. I
6 do respectfully ask that you stick to that topic at
7 hand.

8 Now any questions about this specific
9 format, the meeting format? All right, we will go
10 ahead with the speakers. First we have Jan Vineyard.

11 MS. VINEYARD: I can talk loud, so they can
12 hear me.

13 MS. GILLENWATER: Okay, Ms. Vineyard.

14 MS. VINEYARD: Thank you, I'm not used to
15 going first. I always like to go last and play
16 clean-up. I only have a couple of comments. My name
17 is Jan Vineyard, and I represent the West Virginia
18 Oil Marketers and the Grocers Association, and the
19 West Virginia Trucking Associations.

20 First of all I want to say we really
21 appreciate this interpretive rule. It has done so
22 many things that has helped our companies a great
23 deal. But we still would like to make the fact that
24 we still think it is very burdensome on the

1 businesses for those tanks outside of the zone in
2 turn which I understand are the vast majority that
3 only six percent are in the zone and under concern.
4 Getting all the information that is needed or
5 required by the date of December 3rd is very
6 difficult. For our companies to even register a
7 tank, it was about 40 minutes a tank for those
8 companies who hired somebody to come in part-time and
9 do that. Some of the information was repetitive, but
10 it still took them 40 minutes.

11 The form, Appendix C, the spill
12 prevention response plan checklist, there was
13 information on there that -- especially for our field
14 tanks that we were not able to provide. For example,
15 item number four, provide a site map drawing for the
16 aboveground storage tank facility, include the
17 following information, the boundaries of the
18 property, the waterway, the drainage pipes, all that
19 -- many of our tanks are taken out to a construction
20 site or a coal mine site, that we leave the tank, and
21 go in and put product, and that information because
22 it is on private property where we don't have access
23 to that.

24 I have been told to have our members

1 make note of that. It is on private property. We
2 have requested information that will be satisfied for
3 now, but if that is not the case, there is no way
4 that we can get all this information in a timely
5 fashion.

6 Again, thank you for what you have
7 done, and we will continue to work with you.

8 MS. GILLENWATHER: Angie Rosser.

9 MS. ROSSER: Good evening. Can you hear
10 me? Angie Rosser, West Virginia Rivers Coalition.
11 We appreciate the DEP's efforts to expand
12 opportunities for input on the AST rulemaking
13 process. Our members and citizens at large often
14 wondered if our interest and voices mattered in any
15 policy decision making, especially when it comes to
16 environmental protection. It is meaningful to us to
17 see the agency take extra steps to involve public
18 input in this process.

19 It was highly disconcerting for
20 citizens to hear that industry groups were mounting
21 political pressure to push back deadlines for the
22 initial submission of spill plans and certified
23 inspections. It is not what the public needed to
24 hear to restore confidence that their water supplies

1 were going to be any more protected than they were on
2 January 9th, 2014. We are glad that the Governor and
3 the Secretary recognized that there must be a better,
4 safer solution than delaying protective measures.

5 This interpretive rule is a compromise.
6 We are glad that it maintains implementation
7 deadlines assuring the public that spill plans and
8 inspections are getting done sooner than later. We
9 regret that all initial inspections will not be
10 completed by third party professional engineers, and
11 we do acknowledge that rule making is still a work in
12 progress and the agency has made substantial efforts
13 to assist tank owners with compliance in the form of
14 interim guidance, online resources, and extra
15 staffing to provide on-call technical assistance.

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

1 We offer the following technical
2 comments on the interpretive rule. We recommend that
3 the Level 1 AST definition be consistent with the
4 definition in the rough draft emergency rule. It
5 should be revised so that AST is containing hazardous
6 substances on the list of lists, not just subset, be
7 automatically classified as Level 1.

8 We also recommend that the Secretary
9 use the AST registration data base to immediately
10 assess and identify ASTs that do not automatically
11 fit into the Level 1 definition, but still pose a
12 significant risk, and use his discretionary authority
13 laid out in the rule to classify them as Level 1.

14 Examples to consider include tanks just
15 outside of the zone of critical concern, tanks that
16 contain harmful substances that are not on the list
17 of lists, such as MCHM, or tanks that are not in a
18 zone of critical concern, but are in very close
19 proximity to surface waters.

20 Thanks for your consideration.

21 MS. GILLENWATER: Jill Oliver Thornton.

22 MS. THORNTON: Hello, I'm Jill Oliver
23 Thornton. I own a small business, a woman-owned
24 business. I have Oliver Fuels and Oils. We have

1 been in business since 1950.

2 About all my tanks are going to be
3 Level 2 tanks, and on this interpretive rule, we do
4 appreciate the taking out of the engineers to certify
5 the tanks, because it is going to cost me \$2,000 to
6 \$6,000 per tank. I can't afford that. Small
7 businesses can't afford that. We have programs in
8 place. We have SPCC plans. I'm fine with that. I
9 have no problem. I do ask -- I can't remember when
10 we registered the tank on the SPC -- on the
11 registration, did we submit our SPCC plan then, or is
12 that something coming up?

13 MS. GILLENWATER: Coming up.

14 MS. THORNTON: Coming up, okay. The form
15 is -- to register a tank, it is quite of bit of
16 information. I'm small. I had 20-some tanks to
17 register, but I did it. It was no problem. I will
18 say that the staff at DEP, any questions I had, they
19 were very helpful and kind. We were like all
20 learning this together. But that was a big help to
21 me. That's been something that's kept me up at
22 night, because I just didn't know how I was going to
23 do it, how I could afford it. It was, you know -- we
24 have training, we have spill overfill protection, we

1 have MSDS GHS sheets, we take classes on all these
2 things, we have training, we have everything is in
3 containment, dual wall or in a basin. We do our best
4 to not cause problems, and we are not in a zone of
5 critical concern either.

6 I do have some concerns about how the
7 temporary job site tanks, how you are going to handle
8 -- they are moved around so much, how are they -- is
9 the DEP going to handle when we move them, how are we
10 going to handle registering that, oh, they aren't
11 there anymore, they are here, they are going back
12 out. The SPCC plans on those tanks, I'm assuming
13 right now, that's going to be the operator's
14 responsibility on those temporary job site tanks.

15 The DEP, I wish you would be a little
16 more informative on your certification form that you
17 put on your site, to really tell us what you want to
18 know when we do the inspections; and when we do
19 submit the inspections to you annually, make it
20 simple for us. Make it not a complicated form,
21 something that we could easily take care of. Other
22 than that, this is a lot better than the original
23 thing. Thank you.

24 MS. GILLENWATER: Leonard Womble.

1 MR. WOMBLE: Kelley, thank you. My name is
2 Leonard Womble. I'm associated with a small
3 consulting firm, Environmental Regulatory Compliance
4 Consultancy.

5 MS. GILLENWATER: Can you repeat that?

6 COURT REPORTER: Sir, can you come up here?
7 I can't hear you.

8 MR. WOMBLE: I don't plan to address any
9 specifics in the rule. That's the purpose of this
10 meeting. Right now we are concerned with compliance
11 with the Senate Bill 373, as I recall.

12 With any act of the Legislature or any
13 actions of the private sector or the individuals,
14 there always exists a particular category or problems
15 that fall under the name unintended consequences.
16 What we have in place with respect to Senate Bill 373
17 is a document that unfortunately is creating
18 companies and individuals that are violators, whom
19 otherwise in all probability would be willing to, and
20 are making every effort, to comply with the deadlines
21 in Senate Bill 373.

22 My concern is that there is no
23 mechanism in place to recognize their efforts as
24 being a positive action on their part if they do not

1 meet the respective deadlines. There are a lot of
2 folks and companies, unfortunately at this point in
3 time, are in violation of the registration process,
4 and there will most likely be more potential
5 violations stacked on top of that.

6 I'm hoping that the forthcoming session
7 of the Legislature, for the sake of those that have
8 to abide by this section of the law, and the interim
9 -- or interpretive rule which will be replaced
10 sometime by the draft document which is like 78
11 pages, will find a way to be out of harm's way with
12 respect to potential fines and assessments associated
13 with these unavoidable violations.

14 Thank you.

15 MS. GILLENWATER: Mark Clark. Vivian
16 Stockman.

17 MS. STOCKMAN: Hi, I'm Vivian Stockman with
18 the Ohio Valley Environmental Coalition, which is
19 based in Huntington, West Virginia. As a grass roots
20 organization, that in the past 15 years has served
21 people in the southern mountain communities whose
22 water supplies have been impacted by the disposal of
23 coal cleaning chemicals, like crude, MCHM, and other
24 coal waste, we are compelled to offer these comments

1 today on the interpretive rule for SB373.

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

11 I have more comments, but I'll
12 abbreviate and hand those to you. Just to point out
13 a few highlights. Food grade materials used in the
14 fracking process should not be exempt from either the
15 interpretive rule or the emergency rule. OVEC
16 supports the Secretary's ability to only reclassify
17 tanks as Level 1. Currently the methods for
18 designating tank levels differ in the interpretive
19 rule and the emergency rule. For the sake of clarity
20 methods of classification should be consistent. OVEC
21 urges the Secretary to begin the Level 1
22 classification process now that the registration
23 period has ended, especially tanks located close to
24 zones of critical concern, and especially including

1 tanks storing unknown chemicals where little is known
2 about them, such as crude, MCHM, even if they are
3 below the 50,000 gallon threshold.

4 OVEC asserts that this interpretive
5 rule is a compromise resulting from significant
6 public input and stakeholder meetings. We are
7 concerned that the aboveground tank inspections will
8 not be as thorough as many in the public would like
9 them to be. For example, some tanks are already
10 exempted from the process, including process vessels,
11 temporary tanks and mobile tanks. This includes a
12 number of tanks throughout the Kanawha Valley and
13 throughout the areas where fracking occurs. We
14 encourage greater scrutiny of all these types of
15 vessels.

16 MS. GILLENWATER: IOGA? I wasn't sure if
17 you planned to do the speaking or somebody else.

18 MR. CLARK: No, Charlie Bird will do it.
19 Thank you.

20 MR. BIRD: Good evening, I apologize for my
21 tardiness there a minute ago. I was outside. I
22 apologize. My name is Charlie Bird, I am the
23 Executive Director of the Independent Oil and Gas
24 Association of West Virginia.

1 This -- it goes without saying that the
2 DEP has worked extremely hard in an effort to
3 implement a statute, I hand it to them, after the
4 2014 regular session. We certainly congratulate them
5 for the efforts they've made. But I will say to this
6 group that the interpretive rule, while obviously a
7 temporary measure, does help in some degree on the
8 registration and then the other provisions of the
9 rule.

10 But I will tell you that most of the
11 tanks, nearly all of the tanks used in the oil and
12 gas industry contain products that present no risk to
13 public health and harm. We are going to leave a
14 little more extensive comments here. I do not intend
15 to read through pages of them, but I will say this,
16 our industry will be terribly negatively impacted
17 economically through the implementation of these
18 rules. We are certainly -- have been at the table
19 and will continue to be at the table to try to bring
20 more certainty to our industry and how we are
21 regulated, and how we can advance having these tanks
22 accepted as being safe in our community.

23 We appreciate your time.

24 MS. GILLENWATER: Julie Archer.

1 MS. ARCHER: Thank you. My name is Julie
2 Archer and I'm with the West Virginia Surface Owners'
3 Rights Organization, which is a statewide membership
4 organization representing landowners across the state
5 of West Virginia.

6 Just generally we did submit written
7 comments and so I'm not going to get into all the
8 details of what's in there. We do have some concerns
9 about the interpretive rule that are addressed in
10 those written comments, but just in general we
11 support the interpretive rule.

12 We think it's a reasonable compromise
13 to assist tank owners with meeting pending deadlines,
14 for submitting spill prevention response plans, and
15 completing inspections and certifications without
16 actually changing the deadlines that were specified
17 in Senate Bill 373, and to us that was just not an
18 acceptable alternative.

19 So we really appreciate the effort that
20 the DEP has gone to, to make sure those deadlines are
21 met, and as well as the effort the DEP has gone to,
22 to involve the public in the development of all the
23 various rules related to the AST Act. We feel like
24 the risk-based approach that you all have come up

1 with has a lot of merit. This is a practical way to
2 assist the tank owners with compliance without
3 delaying implementation of the important public
4 safety measures that were in the AST Act, so we
5 really applaud you and thank you very much.

6 MS. GILLENWATER: Maya Nye.

7 MS. NYE: Hi. My name is Maya Nye. I am
8 the Executive Director of People Concerned About
9 Chemical Safety, and for DEP's consideration, you've
10 heard from me multiple times, but for the
11 interpretive tank rule, we offer the following
12 comments recognizing that the most recent version of
13 the interpretive rule, as a couple of my predecessors
14 have said, was a reasonable compromise that provides
15 flexibility for tank owners to meet the deadlines
16 that we feel are so important.

17 That compromise actually came to be
18 through significant public input and stakeholder
19 meetings. This isn't part of the interpretive rule,
20 but Senate Bill 373, perhaps also in talking about
21 unintended consequences already exempts a number of
22 tanks that pose significant risk to the human and
23 environmental health, including process vessels, a
24 number of which are in this valley and across the

1 state that have harmed numerous workers. There have
2 been worker fatalities. There have been worker
3 injuries over the years, and community injuries and
4 fatalities as a result of this. That is another
5 unintended consequence we need to mention.

6 As a result as this compromise, we
7 would just urge DEP not to weaken the rules any
8 further. We have provided written comments, so I'll
9 just briefly summarize what we have.

10 The tank classification as defined by
11 the emergency rule is what is most protective of
12 water, and that's what has been most agreeable to a
13 number of the people who were involved from citizen
14 groups. Section 1.5.C.4 of the emergency rule
15 provides the Secretary with the discretion to
16 designate a change in classification at any level,
17 not just Level 1. So one of the things that we would
18 suggest is that, that actually be adopted in the
19 interpretive rule, in order to best protect public
20 health in the environment.

21 We support this discretion of the
22 Secretary to be able to make those classification
23 distinctions when public health or the environment is
24 in harm's way. Just as in the case of MCHM, the

1 public is unfortunately all too clear that the
2 chemical classification does not always equate risk,
3 and that seemingly benign substances as pointed out
4 previously that they may not always be quite so
5 benign. Milk and maple syrup. I have heard that
6 talked about a number of times, and obviously that is
7 something that is benign, and it's also something
8 that's intended for human consumption.

9 We don't believe that this bill was
10 intended to penalize food producers, but it's not
11 fair that they would be penalized for the risks that
12 other potential food grade classified tank owners may
13 pose. So to clarify our position on that, we would
14 just urge the DEP to allow exemptions -- not to allow
15 exemptions, excuse me, for food grade materials that
16 may cause human or environmental harm, and
17 specifically food grade materials being used in the
18 fracking process, without significant scientific data
19 that illustrates public and environmental safety.

20 We would also urge you to consider the
21 risk of exempting chemically treated non-contact
22 cooling water. And we would also encourage you to
23 begin the process of Level 1 tank classification
24 immediately, and in doing so, taking into

1 consideration tanks that are a close perimeter within
2 the zone of critical concern, but also pointing out
3 that if they are not in a zone of critical concern,
4 they may be next to a school. They may be next to a
5 nursing home. That's something of significant risk,
6 because I know a lot of folks in my community aren't
7 within a zone of critical concern, but very close to
8 a number of tanks. Tanks holding substances
9 identified by OSHA as hazardous may be one
10 consideration, such as in the case of MCHM. Tanks
11 holding substances that may not have undergone
12 sufficient testing to determine human and
13 environmental health. We also have some specifics on
14 some technicalities and the water doesn't smell like
15 licorice anymore, a lot of people have gone back to
16 their daily consumption, but this bill was passed
17 unanimously through both houses, supported by the
18 Governor and the public at large, and it is because
19 of that chemical disaster. It impeded our most basic
20 human functions, and no significant plans were in
21 place to prevent it. So that's the reason we are
22 here, and I don't want to forget that.

23 We recognize the tremendous effort the
24 DEP has gone through to bring this rule to fruition.

1 You guys have worked so hard and diligently to assist
2 tank owners with compliance and to ensure the
3 deadlines are met to prevent public safety measures -
4 - prevent delay in the implementation of public
5 safety measures, and we want to commend your
6 involvement of the public in this process, once
7 again.

8 I think that's pretty much it. Thank
9 you very much. We appreciate it.

10 MS. GILLENWATER: Pam Nixon.

11 MS. NIXON: Hi. I'm Pam Nixon, a
12 resident of Kanawha County. The 2014 Senate Bill
13 373, for the aboveground storage tanks is a good
14 start to protecting the water of the state that are
15 sources for public drinking water. However, there is
16 always room for improvement, as we have heard here
17 tonight from the other speakers.

18 Currently, this might not fall under
19 the interpretive rule, but it is for the protection
20 of our drinking water. Currently calls to the DEP
21 spill lines are being shared between state agencies,
22 but unfortunately there are times -- sometimes a lag
23 time between the information about potential water
24 contamination going to and reaching the affected

1 water systems and suppliers. This could be
2 detrimental to the health of the public. I recommend
3 that the DEP include in the permitting process that
4 the permittees include notification of the public
5 water systems during their initial notifications of
6 the spill, and also include public water systems for
7 updates of additional information. Incidents near
8 public water intakes have occurred in the past across
9 the state in which the information has been slow to
10 arrive at the affected systems. As we saw this year
11 in January, water is the sources of life for the
12 residents and the businesses, and we must protect our
13 watersheds because we all do live downstream.

14 Another comment is that many chemicals
15 stored in the aboveground storage tanks may not be on
16 the list of hazardous and toxic chemicals, but that
17 does not negate the fact that these chemicals should
18 not be ingested or absorbed through the skin. Please
19 do not compromise the legislation any further.

20 Thank you.

21 MS. GILLENWATER: Have I missed anyone?
22 Is there anyone else who would like to speak on the
23 interpretive rule, last chance, going once, twice.
24 Well this concludes the public hearing on the

1 aboveground storage tank program draft interpretive
2 rule. The DEP will review all comments and take them
3 into consideration as it moves forward with
4 finalization of the rule, thank you for your
5 participation in the process. I hope you all have a
6 nice evening.

7

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* * * *

9

CONCLUDED AT 7:00 P.M.

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REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to wit:

I, Dena A. Belisle, Notary Public in and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing was duly taken by and before me, under the West Virginia Rules of Civil Procedure, at the time and place and for the purpose specified in the caption thereof.

I do certify that the said hearing was correctly taken by me by means of the Stenomask; that the same was transcribed by me, and that the said transcript is a true record of proceedings had.

I further certify that I am not connected by blood or marriage with any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially interested in the action, or interested, directly or indirectly, in the matter in controversy.

Given under my hand this _____ day of
October, 2014.

Dena A. Belisle, CCR
Notary Public

My commission expires April 8, 2023.