Antero Resources
1615 Wykoop Street
Denver, CO 80202
Office 303.357.7310
Fax 303.357.7315

July 30, 2015

West Virginia Department of Environmental Protection
AST Rule Comments
attn: Joe Sizemore
601 57th Street, SE
Charleston, WV 25034

Re: Comments of Antero Resources to the Proposed Amendments to 47 CSR, Series 63

Dear Mr. Sizemore:

Please accept the following as the timely filed comments of Antero Resources Corporation ("Antero"), filed by counsel with regard to the draft regulations for Aboveground Storage Act, 47 Code of State Rules, Series 63 ("rules" or "proposed rule(s)"), proposed by the West Virginia Department of Environmental Protection ("WVDEP") and filed with the Secretary of State's Office on June 25, 2015. Antero is an independent exploration and production company engaged in the development and acquisition of natural gas, NGLs and oil properties located in the Appalachia Basin. Antero has over 410,000 net acres of leasehold located in northern West Virginia and southwestern Pennsylvania, all in the southwestern core of the Marcellus Shale Play. Antero has 413 completed and on line horizontal wells and is currently operating seven drilling rigs, including two intermediate rigs in West Virginia.

Since beginning production and exploration activities in West Virginia, Antero has worked with the WVDEP to help regulators understand industry issues to most effectively regulate the operating techniques used throughout the industry. Antero has continually balanced its interests with those of the environment and the health and safety of the citizens of West Virginia. Similarly, WVDEP must balance the interests of the state with those of the regulated community to insure the health and safety of the citizens of West Virginia while also fostering a healthy business environment that insures and secures the many benefits brought to the state by the Marcellus Shale. Among the most basic needs of the industry is a regulatory program that provides regulatory certainty both in its permitting and in enforcement.

Part of that certainty is the development of legislative rules in support of the Aboveground Storage Tank Act. To that end, while Antero applauds and supports portions of the proposed rule, some provisions result in the addition of substantial costs to the regulated community with no corollary environmental or community benefit.

Prior to addressing its specific comments, Antero voices its support with regard to the comments of the West Virginia Oil and Natural Gas Association and incorporates the same by reference. Antero also offers the following specific comments:

Specific Comments to Proposed Amendments to 35 CSR, Series 8

1. **Implementation of the Aboveground Storage Tank Act based on mathematical model**

The amended Aboveground Storage Tank Act regulates aboveground storage tanks that meet the definition of a level 1 or level 2 regulated tank. These levels are in part determined by the location of the tank being located within a zone of critical concern or a zone of peripheral concern. These zones are determined using a mathematical model that accounts for stream flows, gradient and area topography. Antero urges WVDEP to make this model available for public review and comment. Absent the opportunity to review and reflect on the model and its assumptions and the area which will be encompassed by the two zones of concern, it is impossible for Antero to assess the potential impacts of the rule on its operations and the number of ASTs which may be subject to the rule. The location of the regulated tanks and their proximity to potential sources of drinking water are critical in reviewing whether the proper level of scrutiny and oversight is being asserted by the agency. As a result, Antero would suggest that the comment period be allowed to remain open until such time as the zones of concern are entirely defined and allow for meaningful comment at that time or allow for some process for input to potentially amend any proposed rules based upon the size of the zones.

Of specific importance is the zone of peripheral concern, which extends a substantial distance from certain water resources, yet retains many of the same essential regulatory requirements for tanks located in this zone as tanks, which are located in the zone of critical concern.

2. **Secondary Containment. 47 CSR, Series 63-10.2.**

Antero maintains a series of separate comments related to this specific section:

A. The proposed rule at 47 CSR, Series 63.10.2.a. fails to provide an engineering alternative to the requirement to provide secondary containment. Antero proposes the inclusion of the opportunity for an exemption from this requirement for tanks subject to an SPCC plan, if the professional engineer (PE) certifying the spill plans concludes that secondary containment is impractical. In support of this comment, the Oil Pollution Control Act and associated SPCC program, 40 CFR § 112, that provides duplicative regulation of certain tanks allows for a PE to certify the impracticality of secondary containment;

B. The proposed rule at 47 CSR, Series 63.10.2.c is overly prescriptive and requires secondary containment to hold spill or stormwater for 72 hours. This holding time is not prescribed in the federal program, which requires only that the containment be "sufficiently impervious." For purposes of consistency between the two programs, Antero urges WVDEP to delete the language, "but in no case will that time be less than seventy-two (72) hours."

C. The proposed rule at 47 CSR, Series 63.10.2.d prescribes a minimum frequency for inspections. The federal SPCC rule does not specify the inspection frequency, but rather requires operator/owner to follow inspection frequency identified in the plan. Each site is unique and the plans are prepared for the particular site and its needs. To the extent a site is covered by an SPCC plan, Antero urges WVDEP to modify the rule to require the owner or operator to conduct inspections consistent with the plan.

D. The proposed rule at 47 CSR, Series 63.10.2.f prescribes that permeability of secondary containment to be less than 1 x 10-7 cm/sec at anticipated hydrostatic head and shall be verified at the time of installation. SPCC does not have a specific permeability requirement, only that it be "sufficiently impervious." Antero urges WVDEP that the rule to the extent possible maintain a level of continuity and consistency with the federal SPCC program and this requirement be amended consistent with the federal requirement.

E. The proposed rule at 47 CSR, Series 63.10.2.g requires correction and reporting of deficiencies in secondary containment. Antero suggests that deficiencies and reporting of deficiencies that do not result in a release do not need to be reported as is consistent with the federal SPCC program and request that the rule be amended consistent with the federal requirement.

F. The proposed rule at 47 CSR, Series 63.10.2.h requires continuous monitoring of the interstitial space of a doubled walled AST. This creates unnecessary expense and hardship particularly in remote locations that may pose little environmental risk due to contents of the tank and/or lack of proximity to a drinking water source. Further, the federal SPCC program does not require continuous monitoring. Antero urges WVDEP to eliminate this requirement.

G. The proposed rule at 47 CSR, Series 63.10.2.i requires a PE to design and certify secondary containment. Antero urges, where tanks are subject to federal SPCC regulation, WVDEP exempt those tanks from this requirement as the federal requirements already require a PE certify the SPCC plan.

H. The proposed rule at 47 CSR, Series 63.10.2.j imposes requirements for external liners. This requirement is overly prescriptive and exceeds the scope of the federal program. Antero urges WVDEP to leave requirements for external liners to good engineering practices.

I. The proposed rule at 47 CSR, Series 63.10.2.k mandates removal of storm water in certain circumstances. Antero urges WVDEP to mirror the federal SPCC program that requires maintenance of the freeboard but does not specifically mandate stormwater removal.

Antero thanks the WVDEP for the opportunity to comment on these very important modifications to the 47 CSR, Series 63 and for its consideration to the comments contained herein. Antero looks forward to continuing to work with WVDEP in the future to assist in the safe and environmentally sound development of the oil and gas industry in West Virginia. Should you have any questions regarding the content of this letter, the individual comments or any other issue related to the proposed rule, please do not hesitate to contact us.

Sincerely,

Laura M. Goldfarb
Counsel for Antero Resources

Sizemore, Joe M

From: Marc Bryson <Marc.Bryson@steptoe-johnson.com>
Sent: Thursday, July 30, 2015 1:54 PM
To: Sizemore, Joe M
Cc: Marc Bryson
Subject: AST Rule Commments filed by ArcelorMittal Weirton
Attachments: ArcelorMittal AST Rule Comments 7-30-15.PDF

Mr. Sizemore,

Please see the attached comments of ArcelorMittal Weirton LLC to the proposed AST Rules (47 CSR 63, 47 CSR 64, and 47 CSR 65). A hard copy of these comments is also being hand-delivered to your attention today. Please let me know if you need any additional information.

Thank you,

Marc Bryson
Steptoe & Johnson PLLC
P.O. Box 1588, Charleston, WV 25326-1588
Overnight
Chase Tower, 8th Floor
707 Virginia Street, East, Charleston, WV 25301
O: 304-353-8149 F: 304-353-8180 C: 304-610-9847

marc.bryson@steptoe-johnson.com
www.steptoe-johnson.com

STEPTOE & JOHNSON PLLC
ATTORNEYS AT LAW

Chase Tower, Eighth Floor
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000 (304) 353-8180 Fax
www.steptoe-johnson.com

Writer's Contact Information
marc.bryson@steptoe-johnson.com
304-353-8149

July 30, 2015

VIA ELECTRONIC MAIL & HAND DELIVERY

West Virginia Department of Environmental Protection
Aboveground Storage Tank Rule Comments
Attn: Joseph Sizemore
601 57th Street East
Charleston, West Virginia 25304

Re: Comments on Proposed Rules *47 CSR 63*, *47 CSR 64* and *47 CSR 65*
Submitted on behalf of ArcelorMittal Weirton, LLC

Dear Director:

This letter provides the comments of ArcelorMittal Weirton, LLC ("ArcelorMittal" or the "Company") to Proposed Rules 47 CSR 63, 47 CSR 64 and 47 CSR 65 ("Draft Rules" "Proposed Rules" or "Rules") issued by the West Virginia Department of Environmental Protection ("WVDEP" or "Agency") on June 25, 2015. These comments are submitted within the designated comment period, which ends on July 30, 2015.

As an initial matter, ArcelorMittal endorses the comments submitted by the West Virginia Manufacturer's Association ("WVMA") and incorporates the WVMA comments herein. In addition to those comments and concerns set forth by the WVMA, the Company wishes to provide the following comments and suggested amendments to the Draft Rules.

Risk-Based Assessments of Tanks

ArcelorMittal urges WVDEP to amend the draft rules to include provisions that implement § 22-30-25 of the Act. The Act provides WVDEP with the power, by legislative rule, to waive certain requirements for tanks that do not pose a risk to public health and the environment.

§22-30-25 Waiving certain requirements of this article for specified categories of aboveground storage tanks as designated by the department by legislative rule.

The Secretary may designate, by rules proposed for legislative approval in accordance with article three, chapter twenty-nine-a of this code, additional categories of aboveground storage tanks for which one or more of the requirements of this article may be waived upon a determination that such categories of aboveground storage tanks either do not represent a substantial threat of contamination or they are currently regulated under standards that are consistent with the protective standards and requirements set forth in this article and rules promulgated thereunder.

The draft rules do not currently include any language by which WVDEP can implement the discretion afforded by Section 25 of the Act. The draft rules do provide WVDEP with the discretion to change a given tank's level designation in order to protect public health, [1] but the Act also clearly intended for the agency to have discretion to assess the risk for certain categories of tanks and provide waiver from certain requirements that are unwarranted relative to the threat of contamination or public harm.

The AST rules should include provisions describing factors that the Agency may consider in order to determine whether a risk-based waiver of certain rules for certain tanks is warranted. This would allow the regulated community to prepare and submit risk-based analyses for tanks that do not pose a risk to public health or the environment. The inclusion of provisions that implement §22-30-25 has the potential to reduce the regulatory and administrative burden of the Act and Rules for both the regulated community and the WVDEP, while at the same time protecting human health and environment.

There are certain categories of tanks that lie within the Zone of Critical Concern, but do not represent a substantial threat of contamination or are subject to existing regulation that are protective of the environment. As such, owners of these tanks should be afforded the option of seeking a waiver of certain rules based upon a thorough demonstration of reduced risk of contamination.

The Company acknowledges the provisions of W.Va. Code § 22-30-5(c) and Section 4.2 of the proposed rule that also provide for site specific plans or permits. These provisions provide an additional regulatory tool for implementing appropriate AST requirements and should be incorporated with provisions implementing Section 25 of the Act in order to provide WVDEP with the regulatory flexibility that the legislature intended. If a tank owner or operator can demonstrate to the Agency's satisfaction that certain tanks do not pose a substantial threat of contamination as presumed within the Level 1 tank designation, the Agency should have the discretion to exercise an appropriate waiver.

ArcelorMittal's Weirton Facility is a prime example of the need for such a provision. The site contains tanks that should be considered as posing a risk commensurate with tanks that are designated as Level 2 even though they are located within the statutory ZCC. This includes tanks *inside* ArcelorMittal's Weirton Tin Mill that are within the ZCC because they are within 1,000

[1] §1.5.b. states that, "If necessary to protect public health and the environment, the Secretary may designate a change in the level assigned for an AST system."

linear feet of the Ohio River. It is nearly impossible, however, for any contents leaked from these tanks to reach the Ohio River without full industrial treatment. These tanks are located inside a building with drainage infrastructure that is completely within an industrial NPDES-permitted treatment system. Any leaked contents would be contained and routed into an industrial treatment system. The Tin Mill is a 5-story structure, much of which is built below grade, making it impossible for leaked contents to reach the Ohio River by gravity flow. Additionally, large floodwalls exist along much of the Weirton facility's developed river frontage which function as additional diversionary structures that significantly reduce the risk of leaked materials reaching the river.

The regulated community, including ArcelorMittal, should have the opportunity to demonstrate to WVDEP that certain tanks within a ZCC pose a minimal threat to human health or the environment and the WVDEP should have the discretion (as §25 of Act intended) to consider and analyze appropriate waivers of the rules based on relative risk.

Comments Regarding 47 CSR 64

The Fees Imposed in the Draft Fee Rule are Excessive and Arbitrary

ArcelorMittal generally objects to the fees set forth in proposed fee rule 47 CSR 64, and requests that the Agency provide the public and the regulated community with the calculations and assumptions used by the Agency to determine the Operating Fee figures in the proposed rule.

The Annual Operating Fees in Section 3.2 are excessive for Level 1 tanks. It is not entirely clear how the agency plans to use these funds to administer the annual "operations" of ASTs across the State. The $201 figure for each and every Level 1 AST is arbitrary and will result in an unreasonable annual cost for any large facility.

In addition to the Company's concerns regarding the excessive costs imposed by the Annual Operating Fees, the proposed rule's language and fees with regard to the Annual Response Fees dedicated to the Protect Our Water Fund in Section 3.3 are troubling. The Annual Response Fees are also assessed for each individual Level 1 and Level 2 AST in the State. This is not the type of fee assessment that is required by the AST Act. W.Va. Code § 22-30-13(b) provides that:

> "Each owner or operator of a regulated aboveground storage tank subject to a fee assessment under subsection (a) of this section shall pay a fee based on the number, contents and location of regulated aboveground storage tanks he or she owns or operates as applicable." (emphasis added).

A more appropriate implementation of the Annual Response Fee would require an annual payment based on the number of tanks at a given facility, rather than a fee assessed on each and every tank. Other programs, such as the Tier II registration with the West Virginia Emergency Response Commission set forth fees based on the number of substances or tanks registered. As an example, the Tier II filing fee for retail gas stations sets forth a base filing fee of $25 and then

an additional $5 per tank for tanks in excess of 10 tanks. There are similar limits for oil and gas extraction facilities (35 wells) and hazardous substances (5 substances). The Tier II program also establishes an annual fee cap of $100.

Finally, there is no justification for the huge difference in annual operating fees between Level 1 and Level 2 tanks. The Level 1 operating fees should be drastically reduced to be more in line with the proposed fees for Level 2 tanks. There appears to be little justification for such disparate fees. Level 1 tank fees are over five (5) times more than Level 2 fees.

§ 47-64-3.2: Annual Operating Fee

Any fees imposed under the rules should be subject to facility caps. The proposed Annual Operating Fees are arbitrary, excessive and will create a significant financial burden for the regulated community, particularly large manufacturing facilities with a large number of Level 1 and Level 2 tanks. As an example, ArcelorMittal's Weirton facility will be facing an Annual Operating Fee of approximately $10,000 for Level 1 tanks under the proposed Fee Rule. This amount is excessive given the WVDEP's responsibilities under the AST Act and proposed rules.

The facilities that will be hit the hardest by these proposed fees represent many of the largest employers in West Virginia, which already face significant economic pressure. The proposed Annual Operating Fees in Section 3.2 should be subject to a facility cap. ArcelorMittal asserts that a reasonable cap would impose a maximum fee for any facilities with twenty (20) or more Level 1 or Level 2 tanks where no facility would be required to pay annual operating and response fees for more than twenty (20) tanks.

§ 47-64-4: Fee Collection

The rules do not provide any certainty regarding when WVDEP will invoice tank owners and operators for annual fees. ArcelorMittal urges the agency to send invoices at the end of each calendar year. Invoicing AST fees in the subsequent calendar year will allow the regulated community to anticipate and plan for the fees. A predictable schedule is necessary for the regulated community to incorporate the AST fees into their annual budgets and financial planning.

The Financial Implications of the Draft Rules

Another general concern of the Company is the economic impact of the Draft Rule on the regulated community. West Virginia law requires the Agency to consider the economic impacts of any procedural or legislative rule. W.Va. Code § 29A-3-4 provides that:

"§29A-3-4. Filing of proposed procedural rules and interpretive rules.
(a) When an agency proposes a procedural rule or an interpretive rule, the agency shall file in the state register a notice of its action, including the text of the rule as proposed.

(b) All proposed rules filed under subsection (a) of this section shall have a fiscal note attached **itemizing the cost of implementing the rules as they relate to this state and to persons affected by the rules and regulations.** Such fiscal note shall include all information included in a fiscal note for either house of the Legislature and a statement of the economic impact of the rule on the state or its residents. The objectives of the rules shall be clearly and separately stated in the fiscal note by the agency issuing the proposed rules. No procedural or interpretive rule shall be void or voidable by virtue of noncompliance with this subsection." *Emphasis added*

The Draft Rule does not discuss the economic impacts of its implementation on the regulated community. The fiscal notes for each rule primarily discuss the anticipated financial impact on WVDEP, but there is no analysis of the cost to tank owners and operators in the state. ArcelorMittal requests that WVDEP publish its economic analysis with regard to these Rules. ArcelorMittal also recommends that the Agency seek input from the regulated community regarding the economic impact of the Draft Rule. Promoting a healthy and educated discussion with the public about the Agency's assessment of the economics and efficiencies within the proposed rule is important and required by law.

Other Comments

§ 47-63-1.5.c.: Nonoperational Tanks

This provision excludes non-operational tanks from Sections 5 (Operation & Maintenance), 8 (AST Design, Construction, Leak Detection, and Secondary Containment), 9 (Corrosion and Deterioration Prevention), and 10 (Release Prevention, Leak Detection, and Secondary Containment) of the Rules. ArcelorMittal asserts that non-operational tanks should be excluded from ALL of the Rules. It makes little sense for a tank or tank system to be subject to any of the rules if it is not in use.

"Nonoperational storage tank" is defined in the Act as "an empty aboveground storage tank in which fluids will not be deposited or from which fluids will not be dispensed on or after the effective date of this article." *See* § 22-30-3(4). Requiring such a tank to be registered with the state and subject to fees does nothing to advance the purpose of the AST Act and Rules. By definition, it is impossible for "nonoperational storage tanks" to pose a risk to waters of the state and/or human health. Making nonoperational tanks subject to any aspects of the rules amounts to little more than an administrative burden for both the WVDEP and the regulated community

§ 47-63-3.5: Notification of closure

ArcelorMittal asserts that the 30-day notice requirement prior to the permanent closure of a tank is unnecessary and does not advance the purpose of the Act. This requirement could interfere with operations and does not accomplish anything that a post-closure inspection could

not. ArcelorMittal urges WVDEP to remove this requirement, or in the alternative require that notice be sent to the WVDEP within 90 days AFTER a tank has been permanently closed.

§ 47-63-5.2.a.: Inspection Requirements

It appears that the initial fit for service inspections that were conducted pursuant to the 2014 interim AST rules will satisfy the requirements of Section 5.2.a. These inspections were costly for many members of the regulated community. As such, ArcelorMittal requests clarification from WVDEP in response to these comments that inspections conducted pursuant to the interim rules will satisfy the requirements of Section 5.2.a.

§ 47-63-5.5: Spill Prevention Response Plans

Section 5.5.b.1.A. provides that an owner or operator may certify that an AST is subject to a groundwater protection plan (GPP) approved by the Secretary in lieu of submitting a Spill Prevention Response Plain. ArcelorMittal requests clarification as to the process and procedure for making such a certification and the factors, timing and form of an Agency approval or denial of the GPP certification.

§ 47-65-4.4: Notice

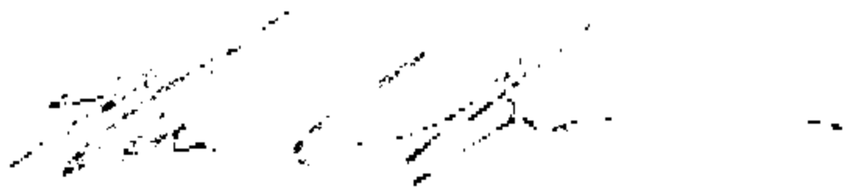
This section provides a responsible party with only ten (10) days after the receipt of a draft consent decree from the Agency to elect whether or not to participate in the administrative process. The timeframe for a response to a proposed consent decree should be extended to at least thirty (30) days. Parties need sufficient time to review and analyze any proposed findings of fact and alleged violations. This process may include interviews with company personnel, collection and review of documents, and consultation with counsel or technical experts. Parties need more time to determine whether or not they wish to participate in the administrative process.

§ 47-65-6.3: Multi-day penalties

As currently written, section 6.3 requires that a "calculation must be made" for each day of violation in the case of an ongoing or continuing violation. All other aspects of the penalty calculations in the proposed rule provide the Secretary with a great deal of discretion. This section should be no different and it is appropriate for the Secretary to determine, on a case-by-case basis, how a proposed penalty should be calculated. ArcelorMittal urges the WVDEP to amend this section so that the Secretary **may**, but does not have to, calculate a penalty based on each day of violation.

ArcelorMittal Weirton, LLC appreciates the opportunity to provide these comments and hopes that they will be given careful consideration along with all other comments submitted by the regulated community. If you would like any additional information or further explanation, please do not hesitate to contact us.

Yours truly,



Marc C. Bryson
Counsel for ArcelorMittal Weirton, LLC

Sizemore, Joe M

From: Randy Swartzmiller <Randy.Swartzmiller@ERGON.com>
Sent: Thursday, July 30, 2015 2:52 PM
To: DEP Comments; Sizemore, Joe M
Cc: Jack Azar; Neil Stanton; Greir Merchant; Patrick Maple; Jake Neihaus
Subject: Ergon-WV, Inc. Comments on AST Rule Title 47 Series 63
Attachments: Ergon-WV, Inc. Comments on AST Rule Title 47 Series 63 July 30, 2015.pdf

Mr. Sizemore, it was nice speaking with you yesterday. Please find attached Ergon-WV, Inc. comments on the proposed *Above Ground Storage Tank Rule.* I also have submitted a hard copy which was mailed out today via U.S. certified mail *(7008 3230 0001 1784 4727).* If you have any questions please do hesitate in contacting myself or Mr. Jack Azar. Thanks Randy

Randal D. Swartzmiller
Ergon-West Virginia, Inc.
Senior Regulatory Specialist

(304) 387-7064
(304) 479-5140
Randy.Swartzmiller@ERGON.com
9995 Ohio River Blvd.
Newell, WV 26050

Ergon - West Virginia, Inc.
9995 Ohio River Blvd
Newell, West Virginia 26050-0356

CERTIFIED MAIL: 7008 3230 0001 1784 4727

July 30, 2015

West Virginia Department of Environmental Protection
AST Rule Comments
Attn: Mr. Joe Sizemore
601 57th Street, SE
Charleston, WV 25304

Dear Mr. Sizemore:

Ergon-WV, Inc. (EWVI) is pleased to provide the enclosed comments to the West Virginia Department of Environmental Protection (WVDEP). We appreciate the opportunity that you have provided us to comment on these rules and are hopeful that these comments will assist you in finalization of Title 47 Legislative Rule Series 63 Above Ground Storage Tanks.

EWVI has significant concerns about the rule and its impact upon our West Virginia operations. EWVI is a much respected operations within our communities and the petro-chemical industry. We have a solid track record of applying and enforcing regulatory requirements as well as applying best industry standards such as those of the American Petroleum Institute (API). EWVI is the largest tax paying company in Hancock County and we wish to continue our operations in West Virginia and are hopeful that the rule may be modified to allow us to continue to be a productive and profitable company in our Northern Panhandle communities.

We agree with the protection of water quality in the State of West Virginia as we live and work here and commend you for all your dedicated efforts.

EWVI respectfully requests your review and consideration of our comments. Please contact the undersigned at jack.azar@ergon.com or 304-387-7046 if you have any questions or require additional information.

Very respectfully,

Jack Azar
ESHT Manager

Enclosure –EWVI Comments of WVDEP Title 47 Series 63 Above Ground Storage Tanks
c: Neil Stanton
Greir Merchant
Jake Neihaus

Ergon - West Virginia, Inc.
9995 Ohio River Blvd
Newell, West Virginia 26050-0356

July 30, 2015

Comments of Ergon-West Virginia, Inc. Regarding Aboveground Storage Tanks, Title 47, Series 63

Ergon-West Virginia, Inc. offers the following comments with regard to the West Virginia Department of Environmental Protection's ("WVDEP") proposed legislative rule, 47 C.S.R. 63, Aboveground Storage Tanks ("Proposed Rule").

- **General Comments**

Piping. At multiple places throughout the Proposed Rule the WVDEP refers to standards for piping. (See, e.g., §§ 2.46 and 2.47, which refer to "associated piping"). The WVDEP has no authority under the AST Act to regulate piping as a separate component. To the extent pipes extend from an AST to the first point of isolation, as appears to be contemplated by § 8.7, such piping is part of the AST. We request that the WVDEP revise §§ 2.46 and 2.47, and all other sections where piping is referred to in a context that suggests it is regulated where it is not part of an AST.

Regulatory Overreach. The WVDEP expresses a strong preference for overseeing all aspects of an AST's existence, from the time of its construction or installation (§ 3.4), through modification, nonuse, upgrading and closure. Of these, it is only authorized to regulate closures, in § 5 of the AST Act. How, when and where ASTs are constructed and located are not for the WVDEP to decide. It has, through this rule, established standards for ASTs that must be met by AST owners and operators, and it has enforcement powers if those standards are not complied with. That should be sufficient for its regulatory responsibilities. Requiring notices before an AST can be constructed, modified, moved or upgraded is not countenanced by the AST Act. In addition, we question whether the WVDEP has sufficient certified/professional expertise in tank construction or modification to properly evaluate all the requests for approval of construction, modification, and other changes that it is likely to receive. Increasing the WVDEP staff to provide this unnecessary expertise and oversight would take years to accomplish and result in great additional expense, without improving the protection of the State and its waters.

Importance of Industry Standards. Ergon-WV, Inc. would like to stress the importance of "compliance with industry standards" as the central tenet of the AST program. The WVDEP proposes some **very** stringent engineering constraints in §§ 8, 9, and 10 that may not be required under API, STI, and manufacturers' recommendations. WVDEP should allow AST owners to seek exceptions to certain requirements using historical data and best engineering

practices. We believe that can best be accomplished through the provisions in the Act and the Proposed Rule that allow the WVDEP to amend Groundwater Protection Plans to incorporate the industry standards in lieu of the alternative controls that are established by the Proposed Rule.

Definitions. Ergon-WV, Inc. would like to suggest that the definitions from the Act be added into the rule. This will provide an easier understanding of the rule without the reader going back and forth between two documents.

- **Specific Comments**

Dispenser System. §2.18. The definition should state that dispenser systems should not be part of an AST if they are found after the first point of isolation. To the extent there is an intervening point of isolation, secondary containment and other requirements do not apply to them.

AST System. §2.2. The WVDEP does not have the authority to regulate AST "*systems*." The AST Act regulates, and defines, aboveground storage tanks, and the scope of the Act and the definition of AST was the subject of much debate. To the extent it is useful in this rule, the AST definition can be repeated verbatim. If the reference to an "aboveground storage tank system" represents an attempt to change the working definition, and hence to expand the reach of the Act, we object to the change because it exceeds the intent of the legislation that was passed.

Piping. §2.6. The last phrase of this definition, "and piping, respectively" should be eliminated. Inspectors are required for ASTs, including any piping before the first point of isolation. There is no authority for regulating piping generally. If the WVDEP retains the reference to piping, the final "and" should be changed to an "or" in order to make the definition internally consistent.

Qualified §2.51. As written, to be "qualified" someone would have to have expertise in <u>all</u> aspects of ASTs, their associated equipment and secondary containment, rather than be knowledgeable about <u>one or more</u> of them. We suggest that the definition be changed to require expertise "in one or more of the following . . ." and then list the areas that special knowledge or ability is desired. It's impractical and unlikely that any single qualified person would have expertise in all of these areas.

Definition of suspected or threatened release. §2.63. The DEP has confused the presence of questionable operating conditions, which should be investigated, with the existence of an actual discharge of substances that should qualify as a release. A release has either occurred or it hasn't, and it is reportable if it has happened. A suspected release may cause an investigation to occur, but it is not something that should be reported until information is available to confirm or reject the release. We suggest deleting this subsection.

Temporarily Out of Service. §2.64. The temporarily out of service status is unnecessary. ASTs may or may not be needed for 180 days, or even for years, but they don't go out of

service during that time. If an AST meets the standards set by the DEP, there is no need for the WVDEP to set an arbitrary point at which they are in or out of service. ASTs can contain the same material that they are registered with and pose the same risk if it is in service or temporarily out of service. This is a burdensome process of registering changes in AST status with no discernable increase in leak protection. (See also our comment with regard to §11.2)

Notice of Change of AST Contents. §3.1.d. If an AST has been registered in the past, and a substance was listed as potential contents of that AST, the switch of contents should not require a three day notice if the change is to one of the registered fluids. In a large industrial manufacturing setting, AST contents may change frequently depending on plant operation, raw materials, market demand and process control. To constantly update a "digitally locked" WVDEP document to reflect changes between previously registered substances or substances with similar properties/CAS numbers is burdensome.

Notification of Installation. §3.4. New ASTs have to be registered before they can be used, and ASTs that have been moved must be re-registered within 3 days. Given this notice to the WVDEP, there is no reason for a separate notification 30 days before installation. If the WVDEP wants to inspect new ASTs, it can do so when it receives the registration form. If new ASTs are being constructed to manufacturer's standards and in accordance with WVDEP guidelines, no restriction should be placed on the use of an AST after registration. Furthermore, there is no timetable given for how long the Secretary has to review and approve submitted installation paperwork, potentially stalling not only economic growth but in some cases environmental or safety improvements.

Certificates to Operate. §4. There is no provision for automatic issuance of a certificate to operate. As ASTs cannot be used if no certificate has issued, (*See* §3.1.c.2) there could be periods of time, upon initial registration or sales of tanks, when an AST will be in use but a certificate to operate will not have been issued. We suggest that certificates to operate be issued upon completion of registration or amended registration, but subject to withdrawal in the event there are noncompliance problems.

Flexible Standards. §4.2.a.2.B. This is stated in the absolute – every option under the industry standards is treated as a requirement. While this generally will be appropriate, there are some situations where the WVDEP may want to give relief from industry standards, such as where the AST owner wants to use a different, perhaps more protective, standard. Instead of saying "the Secretary will interpret" the WVDEP should say "the Secretary may interpret," which gives WVDEP flexibility to approve an alternative interpretation when it is appropriate, but does not require the WVDEP to do so. We would also note that the parenthetical reference to "(API 653 Standards for Tank Inspection, Repair, Alteration and Reconstruction)" should have an "e.g.," in front, to confirm that it is an example, not the only industry standard that may be followed. In that event, it would read as "(e.g., API 653 Standards for Tank Inspection, Repair, Alteration and Reconstruction)."

Fire Codes. §§4.3.a and 8.3.a. There is no reason to make state and local fire codes enforceable conditions in AST rules, any more than the WVDEP should require AST owners to pay, for example, their workers compensation premiums as a condition of AST siting. Fire codes are sufficiently enforceable by the proper authorities without making them part of this rule.

Monthly facility inspections. §5.1.b. Inspecting all of a tank exterior, including vents and other devices, can put employees in danger if they have to access the tops of tanks or work in other dangerous locations, particularly during winter months. For example, there is no need to check emergency relief valves every month. Operators should be able to decide which equipment can be safely accessed, and could be inspected once per month, and which could be done on an annual basis

Pipe Signage. §5.6.c. We agree that an AST owner should be able to tell what is flowing through the AST pipes, but we assume that placing this requirement in the signage section does not mean that the substances must be reported on signs. We further assume that the requirement that flow control points be identified does not mean that signs as large as those mandated for ASTs are required. Finally, "other suitable means" should include operator process knowledge. We suggest those points be clarified in the rule.

Compliance with Industry Standards. 8.1.a, 8.1.b., 8.2.a, 8.2.c, 8.4.a. We agree that ASTs should be constructed and installed in accordance with an industry standard or code of practice, but it may not be practical to comply with <u>all</u> "applicable industry standards and codes of practice." (For example, STI and API standards may exist for a steel tank, and may differ somewhat.) We suggest that the compliance with the manufacturer's requirements, and one applicable industry standard, should be sufficient.

AST Siting Approval. §8.2.f. The WVDEP does not have authority to require AST owners to get approval before they can put ASTs in place. It can establish standards with which owners and operators must comply, but it does not have pre-installation approval authority under the AST Act.

Piping Regulation. §8.3.b. Piping connected to ASTs is already regulated, up to the first point of isolation; there is no need to specially reference it.

AST Gauging. §8.3.d. Not every AST needs to be equipped with a gauge. In some circumstances, use of a gauge stick should be sufficient to determine the depth of tank contents.

Leak detection. §10.3. The leak detection requirements of the rule will be difficult to comply with. Some tanks have product moving in and out, as part of the production process, on a continuous basis, and detecting a leak through use of other than visual means is not feasible. In addition, breathing losses or temperature changes on larger tanks will be an impossible standard to achieve in many situations.

Temporarily Out of Service ASTs. §11.2. There is no provision in the AST Act for regulating ASTs that are "temporarily out of service" (TOS). First and foremost, ASTs that are TOS may be holding contents, but aren't moving contents in and out, according to the definition of TOS in Section 2.64. In other words, a TOS AST is storing fluids, which is the purpose of an aboveground storage tank. The fact that fluids are not moving in and out has no bearing on whether the AST is fit to hold those fluids. That is determined by compliance with the AST standards established by the WVDEP.

Note that TOS ASTs are subject to the same continuing maintenance and inspection requirements. That being the case, it is not apparent what justification the WVDEP offer for requiring a notification of a change in AST status if there is no movement in or out of the AST for 6 months, or when that notification would be given. One may not know whether an AST will be used over a 180 day period until the 180 days has passed. Is the notification required within 180 days of that period? Even if the AST owner knows that the AST won't be used in the next 180 days, there is no reason to give notice when he or she has to meet the same standards whether or not the AST is TOS during that period.

The TOS section is internally inconsistent, as well. ASTs that are TOS are to undergo regular annual inspections and certifications (11.2.a.5) but they are also required to undergo the annual inspection when they are put back in service (11.2.b.1.). One of those, but not both, is appropriate.

It is not clear to us what the WVDEP intends by its regulation of TOS ASTs. If this is an example of making the AST program conform to the Underground Storage Tank ("UST") program, we think it is a mistake. The two systems are quite different, and one is not a fit for the other. The UST program is overwhelmingly fuel tanks at retail gasoline establishments, where constant fluid movement is expected if the UST owner is to make money. If there is no product flowing in and out of those USTs for a half year, there is likely some reason that may require additional inquiry. That is not the case at chemical facilities and other manufacturing sites, where ASTs may hold a fluid that is used only at intervals that could exceed 180 days.

We urge the WVDEP to let AST owners manage their ASTs, in accordance with the WVDEP's reasonable regulations, and leave out the requirements for notifying when ASTs are "nonoperational" or "TOS."

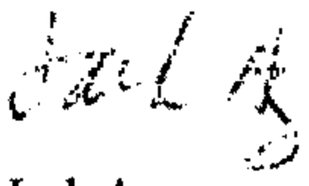
Use of a Locking Device. §12.2.c. The WVDEP should not, under any circumstance, attach a locking device to an AST because it believes the AST should not be receiving product, unless it has obtained an injunction or other court order to do so. Locking devices could present a significant danger to plant personnel if a chemical process cannot be controlled by closing or opening a valve. In the rare event where an emergency lockout is needed, there are expeditious court procedures available that would allow the WVDEP to request emergency authority to act, and would allow the AST owner to explain why a lock should not be put in place. We request that WVDEP use the already established legal channels in pursuing emergency closure of a tank, and not act unilaterally and dangerously.

Closure Plan. §11.4.e. The closure plan requirement adds paperwork with no discernible value. If the AST is closed, following all RCRA cleaning/disposal procedures, and no contamination is noted, no report should be required. Instead, 11.4.e. has sampling and testing requirements for "areas where contamination is most likely to be present", which appears to be a case of a solution looking for a problem where there isn't any.

- **Conclusion**

EWVI respectfully requests your review and consideration of our comments. Please contact the undersigned at jack.azar@ergon.com or 304-387-7046 if you have any questions or require additional information.

Respectfully submitted,



Jack Azar
ESHT Manager

FirstEnergy

800 Cabin Hill Drive
Greensburg, PA 15601

FEDERAL EXPRESS

July 29, 2015

WVDEP
Aboveground Storage Tank Rule Comments
Attn: Joe Sizemore
601 57th Street, SE
Charleston, WV 25304

Dear Mr. Sizemore:

Subject: FirstEnergy Corp. Input and Comments on Proposed Rule 47 CSR 63

FirstEnergy Corp. respectfully submits input and comments provided in Attachment 1 to this letter regarding the West Virginia Department of Environmental Protection's (WVDEP's) proposed Rule 47 CSR 63, Aboveground Storage Tanks, establishing a regulatory program for aboveground storage tanks as mandated by §22-30 of the Code of West Virginia. We appreciate WVDEP affording the public and industry the opportunity to provide input on this proposed rule.

If you should have any questions or clarifications regarding the submitted input and comments, please do not hesitate to make contact with either of FirstEnergy's AST subject matter experts found in Attachment 2 of this letter.

Sincerely,

Gary R. Haag

Gary R. Haag, P.E.
Supervisor, Environmental Governance

Attachment

ATTACHMENT 1
FirstEnergy Corp.
Input and Comments on:
WVDEP Proposed Rule 47 CSR 63

FirstEnergy

Input and Comments on Behalf of FirstEnergy Corp. and its Subsidiaries WVDEP Rule 47 CSR 63, Regulation of Aboveground Storage Tanks

Submitted by: Gary Haag and Karen Reese/FirstEnergy Corporate Environmental Dept.

Date Submitted: July 29, 2015

FirstEnergy Corp. is an investor owned electric utility which has facilities located in the states of Ohio, Pennsylvania, New Jersey, Maryland, West Virginia, and Virginia. Combined our electrical generation facilities produce greater than 17,000 megawatts of electricity and our ten electric subsidiary companies deliver electricity reliably to nearly 6 million customers in these six states. In West Virginia our subsidiaries, MonPower, Potomac Edison, Allegheny Energy Supply, LLC, and Trans-Allegheny Interstate Line Company deliver electricity to over 500,000 customer and generate greater than 4,000 Megawatts (MW) electricity (3,082 MW of regulated and 1,300 MW of unregulated generation). To provide safe, reliable, and affordable electricity generation and delivery, our subsidiaries have made significant infrastructure investments at their facilities, including the installation of aboveground storage tanks and process treatment vessels.

General Comments

1. FirstEnergy appreciates the opportunity to provide comments on the proposed rules. We continue to believe that input from stakeholders, such as electric utility industry, is important for the development of a final rule package that balances prudent regulation with the long-term protectiveness of the environment. We also continue to believe that WVDEP, within reason, should model the final rule package with regulatory procedures and prudent requirements provided by States that already have aboveground storage tank regulations that have proven to be successful, while still prudently protecting the environment.

2. Similar to other publically regulated utilities in the State of West Virginia, it is import to recognize that the implementation schedule and overall costs to comply with the final rule package will increase the costs of delivering safe and reliable electricity to our customers in the State. Such increased costs to initially comply, and to continue to comply with these rules will likely be borne by our customers through future rate cases. Therefore, while we appreciate and understand the Department's role in protecting the environment, we also ask that the final rule package be prudent with its timeframe for compliance and eliminate overly burdensome requirements which offer little to no added protection to the environment at the potential future cost to our customers.

3. We understand why certain portions of the proposed regulations need to be written specifically to address the implementing law, but the Department was also given the opportunity and leeway to develop a prudent set of requirements for implementing SB 423. In finalizing the rule, we suggest the Department once again look at States, like Pennsylvania, who have aboveground storage tank rules that have a long history of proving to successfully regulate ASTs and protect the environment.

4. We request as part of finalizing the rule package that the Department have an independent party complete a net economic and environmental benefit analysis of the regulations to

§47-63-5 Operation and Maintenance Requirements

13. **Section 5.1 General Operation and Maintenance**. The potential risk varies based on tank size, construction and product stored. This rule is overly burdensome for small shop built tanks, (e.g., tanks not greater than 21,000 gallon) that do not contain extremely hazardous substances and should therefore, exempt such tanks from this requirement.

14. **Section 5.1.b.4.** This Rule requires a monthly check of overfill prevention equipment. While this may be possible for some types of audible overfill alarms it would be beyond the capabilities of the owner/operate to check mechanical overfill prevention equipment. That is, a tank contractor with overfill equipment expertise would be required to perform checks on such devices.

15. **Section 5.2. Required Inspections.** While we agree that regulated AST systems should be inspected by qualified individuals on a predetermined frequency/ies, we believe that inspecting all Level 1 ASTs on a three (3) year interval and Level 2 ASTs on a five (5) year interval is neither prudent nor efficient. Such inspection frequency is not consistent with respected industry standards, or those frequencies used by other States with AST regulations. Established standards recommended inspection frequencies based on sound engineering principals should be utilized. Inspection frequencies should be revised to reflect prudent intervals based on industry standards, the size and construction of the ASTs, the product contained in the tank and allow for flexible best engineering judgment to increase or decrease inspection frequencies based on information from individuals certified by tank industry organizations. In not case should the interval be more than five (5) years for a Level 1 AST and ten (10) years for a Level 2 AST.

16. **Section 5.2.b.2.** An extreme effort and expense was put forth to comply with the AST inspection requirements outlined in Interpretive Rule 47 CSR 62 in a timely manner. Therefore, all inspections conducted in accordance with the Interpretive Rule should be considered to meet the initial inspection criteria under this Rule.

17. **Section 5.3 Internal Inspection Requirements.** Internal inspections of regulated ASTs should not be required for tanks less than 21,000 gallons consistent with regulations from other States with aboveground storage tank regulations that have proven to be successful. The risk of internal failure from small ASTs is minimal while the difficultly in conducting internal inspections on small tanks is great. External inspections in accordance with industry standards should be sufficient to minimize the risk of potential failure.

18. **Section 5.3.g.** Language should be added to this Rule consistent with language in Rule 5.2.e. that allows a tank owner or operator to request a waiver from the Secretary for good cause shown.

19. **Section 5.4.b.1** The proposed Rule requires tanks subjected to damage due to such things as natural disasters to be evaluated by a PE, API or STI certified inspector within 10 days of discovering the damage. While this should definitely by a goal it may be impossible to achieve during such natural disasters. The rule should be revised from "shall" to "should be conducted

with 10 days or as soon as possible thereafter" for a Level 1 AST but in no case greater than 30 days. This is consistent with the period outlined in §5.1.b.6.a., to assess tank changes identified in the monthly inspection that could negatively affect the AST system integrity.

20. **Section 5.5.a.1 Spill Prevention Response Plan.** The proposed Rule states that the Secretary may develop a form or procedure to allow the tank owner or operator to certify that the previously approved plan was reviewed and no changes were necessary to update the plan. Such a process would lessen the reporting burden and therefore, the process should be incorporated into the Rule. This could be as simple as stating that "if upon review no changes are necessary to update the plan the AST system owner/operator may certify such in writing to the Secretary in lieu of resubmitting the plan".

21. **Section 5.5.a.2 Spill Prevention Response Plan.** The time period for the submittal of a revised plan or addendum due to the occurrence of the items listed under this section should be increased to one hundred and eighty (180) days. The 180-day time period is consistent with federal SPCC requirements for such events.

22. **Section 5.5.c.5 Spill Prevention Plan.** The Rule should be revised to state that the secretary will identify the nearest downstream public water supply intake and provide this information to the AST owner/operator.

23. **Section 5.5.d Spill Prevention Plan.** The Rule should be revised to state that the AST system owner/operator shall annually review the SPRP contact information and update the information if changes have occurred. It makes no sense to require an update to the plan if no changes have occurred.

§47-63-6 Reporting and Recordkeeping

24. **Section 5.6.a.** This item should state that the label or marking is not required on ASTs that have undergone permanent closure or are permanently out of service.

25. **Section 6.3.a.** Seven days does not provide sufficient time to investigate a suspected or threatened release and provide findings to the Department. For example it may take more than 7 days to determine that a tightness test or sampling is required and then to mobilize the contractor to perform the work, plus the time to obtain results from the laboratory. The seven days should be extending to 14 days for both level 1 and level 2 tanks to allow sufficient time to conduct a thorough investigation and report the results.

§47-63-7 Corrective Action

26. This section is excessively detailed. It is difficult to envision how the requirements of this section could be completed and followed by the AST owners and operators. Section 7.1 states that "owners and operators of ASTs must, in response to any confirmed release or threatened release from an AST, comply with the requirements of this section unless directed otherwise by the Department". Then the following eleven (11) pages outlines what to attempt to do but is entirely too confusing.

§47-63-8 New Aboveground Tank Installations and Reconstructions

27. **Section 8.7.e., Piping for ASTs** states that underground pressure piping systems must be equipped with automatic line leak detectors which alerts the operator to the presence of a leak by restricting or shutting off the flow of substances. It may be difficult to impossible to install line leak detection on all pressure piping systems. In such circumstances monitored double walled piping should be acceptable. Therefore, the rule should be revised to state that pressure piping systems must be equipped with automatic line leak detectors or monitored double-walled piping that will alert the operator to the presence of a leak by restricting or shutting off the flow of substances or triggering an audible or visual alarm.

§47-63-9 Corrosion and Deterioration Prevention

28. **Sections 9.3.b.1 and 9.3.d.** These sections require cathodic protection systems to be tested by a NACE certified tester within 6 months of installation and annually thereafter for cathodic protection systems on tank bottoms in direct contact with soil or other electrolytes and impressed current systems. There is no justification for the annual frequency for such testing. Other states that have effective AST regulations require such inspections every 5 years and underground storage tank regulations require cathodic protection system inspections every 3 year. The annual frequency should be revised to be not more than every 3 years.

29. **Section 9.3.f.1.** A defective cathodic protection system is extremely unlikely to cause an immediate threat of a release. The secretary should be allowed to provide additional time to the AST owner/operator to repair a cathodic protection system based on the risk posed from the AST. Therefore the following should be added .....within (90) days "or within an alternate timeframe authorized by the Secretary in writing upon request of the owner or operator and for good cause shown".

30. **Section 9.4.b.** This Rule states that the owner or operator shall ensure that the coating is able to permanently bond to the regulated AST. We do not believe it is possible that anyone could ensure that a coating can permanently bond to an AST. If this was possible we would never see rust spots, blisters, peeling or cracking on any AST surface.

31. **Section 9.4.e** This Rule requires AST systems repairs within twelve (12) months for Level 1 ASTs and twenty-four (24) months for Level 2 ASTs when the types of painting or coating failures as outlined in §9.4.e.1. through §9.4.e.5. are detected. It is not cost effective nor would it better protect human health or the environment to repair the exterior system of an AST for a small or insignificant area of rust spots or blisters. Therefore, the degree of failure to require a repair should be quantified based on a standard or based on a reduction of overall shell thickness that could reduce the integrity of the AST.

§47-63-10 Release Prevention, Leak Detection and Secondary Containment

32. **Sections 10.2 and 10.2.a. Secondary Containment Requirements for AST Systems**. The owner or operator shall ensure all regulated AST systems have a secondary containment system that collects and contains an unintentional release from the AST and its ancillary equipment. This requirement places a huge burden on the owner and operators of the AST systems. The majority of our ASTs fall under SPCC regulations for "bulk storage" of oil related products or store hazardous chemicals and have sized secondary containments. We

understand and agree that sized secondary containment is required for these AST. However, some tanks at our generating plants have never been required to have secondary containment because they do not contain oil or a hazardous substance. It is unreasonable and economically unfeasible to require all ASTs to have sized secondary containment. Tank containment requirements should be based on risk and the impact to human health and the environment in the event of a release. Many of our tanks contain non-petroleum, non-hazardous substances and a release would have little or no impact on the environment (e.g. a sludge tank separating river water and sediments or a water tank with minimal pH chemical adjustment). Because there are different uses of tanks in the state, this particular section of the Rule needs completely reviewed by a committee which includes industry professionals to create practical regulation based on industry standards and guidelines. Requests for exemption from the Secretary should be permitted in this section. The West Virginia Storage Tank Act §22-30-25 empowers the Secretary to waive one or more of the AST requirements based upon a determination that such categories of aboveground storage tanks do not represent a substantial threat of contamination. We believe that the secondary containment and leak detection requirements for many of our tanks should be waived as the ASTs do not pose a substantial threat of contamination. The waiver for the category of ASTs that do not contain petroleum or hazardous substances should be incorporated into this section of the Rule.

The rule implies that in addition to the AST all ancillary equipment which by definition includes piping requires secondary containment. Basically all equipment that would contain a regulated substance, must have secondary containment. Many complicated AST systems are currently installed in West Virginia and other states that do have secondarily containment ancillary equipment and based on the design and layout of the AST system, modification to meet this requirement may be impossible. In many AST systems, particularly suction and gravity piping systems the risk of a substantial release from the ancillary equipment is small and would not justify the expense of retrofitting or possibly relocating an AST system.

33. **Sections 10.2.f. and 10.2.i Secondary Containment Requirements.** The definitions in the West Virginia Storage Tank Act defines secondary containment as being sufficiently impervious and designed to contain for a minimum of seventy-two (72) hours. The sufficiently impervious in this Rule is defined as 1×10^{-6}. These sections redefine the definition in the storage tank act for secondary containment by requiring containment to meet the 1×10^{-7} standard and to contain a discharge for 7 days or 30 days respectively for a Level 1 or Level 2 AST. These Rules to be revised to be consistent with the definition of a secondary containment presented in the Storage Tank Act.

34. **Section 10.2.k Secondary Containment Requirements**. A written log of discharge events from the secondary containment should not be required when the discharge is being routed to a treatment facility.

35. **Section 10.2.l.1 Secondary Containment Requirements**. For Level 1 ASTs, the AST system component not meeting secondary containment requirements must be upgraded to meet secondary containment requirements for existing ASTs with three (3) months of the effective date of this Rule. Please see our comments for Section 10.2 and 10.2.a. above. Some tanks at our generating plants have never been required to have secondary containment because they do not contain oil or a hazardous substance. Many of these tanks are in locations where it may be impossible to construct sized secondary containment. Engineering design alone may take an extended period of time along with obtaining funding and doing construction. Three months is an unreasonable timeline especially for tanks that were previously not required to

have containment. The schedule for meeting the requirement at the very least should be extended to June 30, 2017, for Level 1 tanks. Also, provisions should be added to the Rule to allow the Secretary to approve time extensions upon request and for good cause.

36. **Section 10.2.I.2 Secondary Containment Requirements.** For Level 2 ASTs, the AST system component not meeting secondary containment requirements must be upgraded to meet secondary containment requirements for existing ASTs with six (6) months of the effective date of this Rule. Please see our comments for Section 10.2 and 10.2.a. above. Some tanks at our generating plants have never been required to have secondary containment because they do not contain oil or a hazardous substance. Many of these tanks are in locations where it may be almost impossible to construct secondary containment. Engineering design alone may take an extended period of time along with obtaining funding and doing construction. Six months is an unreasonable timeline especially for tanks that were previously not required to have containment. This schedule for meeting the requirement at the very least should be extended to December 31, 2017 for Level 2 tanks. Also, provisions should be added to the Rule to allow the Secretary to approve time extensions upon request and for good cause.

37. **Section 10.2.h Secondary Containment Requirements.** The Rule states that double-walled ASTs serves as secondary containment "but the piping, dispenser, and ancillary equipment would require secondary containment". Double-walled tanks system without secondary containment on piping and ancillary equipment are standard installation and do not have a history of releases to the environment. With the added operation and maintenance requirements outlined in this rule and tank filling operations and dispensing being monitored or manned, the risk of a release from this equipment is extremely minimal. There is no justification to install or retrofit a double-walled AST system with costly containment for piping and ancillary equipment. Therefore, requiring secondary containment for piping, dispensers, and ancillary equipment should be deleted from the secondary containment requirements for double-walled ASTs or at a minimum for existing double-walled ASTs.

38. **Sections 10.3 and 10.3.b Leak Detection Requirements**. The owner or operator shall ensure that regulated AST systems are monitored for leak detection at least once a month and shall ensure that the area beneath the tank bottom is monitored for leakage by visual, mechanical or electronic leak detection methods. There are existing tanks that are built directly on the ground that do not have leak detection. These tanks contain non-petroleum, non-hazardous substance or water with low levels of water quality adjustment additives. For example a tank that is used to separate sediment from river water and is set on a raised concrete pad sealed at the tank chime. There can be no visual examination of the bottom and to provide automatic tank gauging or another method of leak detection as suggested in §10.3.e. may be impractical or impossible. Leak detection requirements should be based on risk and the impact to human health and the environment in the event of a release. There should be exceptions to perform leak detection and visual examinations on tank bottoms based on the tank contains and its threat for contamination. Requests for exemption from the Secretary should be permitted in this section. The West Virginia Storage Tank Act §22-30-25 empowers the Secretary to waive one or more of the AST requirements based upon a determination that such categories of aboveground storage tanks do not represent a substantial threat of contamination. We believe that the leak detection requirements for many of our tanks should be waived as the ASTs do not pose a substantial threat of contamination. The waiver for the category of ASTs that do not contain petroleum or hazardous substances should be incorporated into this section of the Rule.

39. **Sections 10.3. and 10.3.e. Leak Detection Requirements** – Acceptable forms of leak detection for existing AST systems should include annual tightness testing. This may be the only potential means of leak detection for some existing AST were one of the listed methods of monthly monitoring is impossible or impractical.

§47-63-11 Nonoperational, Change in Service and Closures of AST Systems

40. **Section 11.2 Temporarily Out of Service.** This entire section is confusing and contains several contradictions and should be rewritten.

41. **Section 11.2.a.3 Temporarily Out of Service.** The requirement to empty the AST should be deleted. The definition of "temporarily out of service" states that the tank may contain material but is not currently in use receiving or dispensing fluid for 180 days.

42. **Section 11.2.a.7 Temporarily Out of Service.** This Rule is confusing. By definition a temporarily out of service AST is not receiving of dispensing fluid for 180 days but whose active use is intended in the future. The requirement to cap or blind flange all piping should not be required until 180 days after being declared temporarily out of service which could be 360 days after not receiving or dispensing fluid. It appears that this is the intent of the Rule but it should be revised to state 180 days after being declared or determined to be temporarily out of service. By no means should a temporarily out of service AST in an operating facility be required to cap or blind flange all piping until 360 days or a year after not receiving of dispensing fluid.

43. **Section 11.2.b.1, 2 and 3 Temporarily Out of Service.** The inspection and testing frequencies should be no more frequent than required in §47-63-5.

44. **Section 11.4.a Permanent Closure of Regulated AST Systems.** The Rule as currently written states that all tanks taken out of service must be either dismantled and removed from the site or rendered unusable for the storage of any substance. The rule should only apply to permanently closed ASTs. In addition, a prevision should be included to allow permanently closed ASTs in operating facilities that have been properly marked/labeled and secured by capping or flanging all piping to remain on site without being rendered unusable.

45. **Section 11.4.c. Permanent Closure of AST System.** This paragraph states that closure activities must be performed in accordance with closure guidance developed by the Secretary. Guidance documents are not regulation and have not gone through the public notification and comment process; thus, the statement that that closure activities must be performed in accordance with closure guidance developed by the Secretary should be deleted. Required closure activities should be outlined in §47-63-11.

46. **Section 11.4.d. Permanent Closure of AST System.** Closures for all ASTs should not be treated the same. Conducting a closure assessment for all AST systems not taking into consideration tank size or design is not reasonable or warranted. A simplified closure process should be developed for small ASTs. For example the closure activities for a 2,000 AST, which basically involves empting the AST, removing all residue and proper disposal should not be required to be performed by a professional engineer, or a person certified by API or STI.

47. **Section 11.4.e. Permanent Closure of AST System.** Closures for all ASTs should not be treated the same. Conducting a closure assessment for all AST systems not taking into consideration tank size or design is not reasonable or warranted. A simplified closure process should be developed for small ASTs which requires visual examination of the surface, soil and area surrounding and underlying the AST system for obvious indications or evidence of a release instead of conducting closure sampling. If a release is suspected based on the visual examination then and only then should closure sampling be required.

48. **Section 11.4.h. Permanent Closure of AST System**. This Rule should be revised to allow permanently closed ASTs in operating facilities that have been properly marked/labeled and secured by capping or flanging all piping entering the AST to remain on site without being rendered unusable.

§47-63-11 Financial Responsibility Requirements

49. **Section 13.2 Allowable Mechanisms of Financial Assurance or Bonding.** The "Financial Test of Self-Insurance" should be listed in this section as an acceptable means to demonstrate financial responsibility for ASTs. This is consistent with demonstrating financial responsible under RCRA and state underground storage tanks regulations.

ATTACHMENT 2
FirstEnergy Corp.
Points-of-Contact
Aboveground Storage Tanks

Points-of-Contact

Jason A. Speicher
Senior. Environmental Scientist
(610) 921-6935 (Phone)
(610) 939-8552 (Fax)
(610) 223-6130 (Cell)
jspeicher@firstenergycorp.com

Karen S. Reese
Senior Environmental Specialist
(330) 384-5948 (Phone)
(330) 384-5433 (Fax)
reesek@firstenergycorp.com

Gary R. Haag
Supervisor, Environmental Governance
(724) 830-5459 (Phone)
(234)-678-2384 (Fax)
ghaag@firstenergycorp.com

GO-MART, INC. AND ST. MARYS REFINING COMPANY
COMMENTS ON THE PROPOSED RULE, 47 C.S.R. 63
FOR ABOVEGROUND STORAGE TANKS

July 30, 2015

These comments are submitted on behalf of Go-Mart, Inc. ("Go-Mart") and St. Marys Refining Company ("SMRC"). Go-Mart 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 prepared in accordance with the United States Environmental Protection Agency (EPA) regulations.

A substantial percentage of the motor fuel sold in West Virginia passes through the Go-Mart and SMRC terminals. This fuel is sold at Go-Mart retail outlets throughout West Virginia. The terminals also furnish fuel which is sold in Ohio Go-Mart retail outlets. In West Virginia, Go-Mart competes with retailers who receive fuel from terminals located in Ohio and Kentucky. Like Go-Mart and SMRC, these out-of-state terminals would be subject to SPCC requirements. However, based on our review, these neighboring states do not impose additional requirements on ASTs, AST systems and piping as stringent as those which appear to be imposed by the Proposed Rule. As a result, the rule as drafted will place Go-Mart at a competitive disadvantage to those who obtain fuel from out-of-state terminals.

I. SCOPE OF REGULATION

DEFINITIONS OF AST AND AST SYSTEM

Go-Mart and SMRC are concerned that the statutory limitations on the scope of regulatory authority are not always recognized by the Draft Rule. The Act is directed at achieving a regulatory program for ASTs. ASTs are defined to include piping and dispensing systems up to the "first point of isolation." W.Va. Code § 22-30-3(l). The statute defines first point of isolation as "the valve, pump, dispenser or other device or equipment on or nearest to the tank where the flow of fluids into or out of the tank may be shut off[.]" W.Va. Code § 22-30-3(3). This definition was adopted by the legislature as a result of DEP's decision to define the "first" point as the "last" point in its first set of AST regulations.

The tendency to overregulate which doomed the first set of rules and led to a rewrite of the Act persists, albeit to a lesser degree, here. Rather than deal with the AST as defined in the Act, DEP continues to discuss broader concepts such as "AST Systems" and "ancillary equipment." In addition, the Draft Rule does not always recognize the limitation imposed by the legislature's determination that pipes and dispensing systems are subject to regulation only up to the first point of isolation. It appears that the Proposed Rule at certain points recognizes the "first point" as the terminus for DEP authority by referencing "regulated piping" as an example. However, this terminology is not consistently used so that the term "piping," for example, often appears with no qualifier.

Therefore, two changes are necessary to make the Proposed Rule consistent with the Act. First, the Rule must clearly recognize that what is subject to regulation is limited to ASTs as defined in the Act. Since the Act defines AST as the tanks and ancillary piping and dispensing systems to the first point of isolation, there is no need to reference these terms separately or to broaden the scope of regulation to "AST systems" or "ancillary equipment."

These terms appeared in DEP's first set of regulations, and the decision of the legislature not to adopt them in the revised Act is clear evidence of the legislature's desire to limit the scope of regulation.

The second change would be unnecessary if the first is adopted. However, to the extent that DEP believes that its Proposed Rule must refer to items other than the AST as defined by the Act, it must definitively limit items to the first point of isolation everywhere they are referenced or utilize a general reference which accomplishes this.

II. LEAK DETECTION

a. It is not clear what is meant by § 10.3.b which requires monitoring of the area beneath bottom of the tank for leakage by visual, mechanical or electrical means. All leak detection methods are designed to detect leakage in the tank bottom. However, for most existing tanks there is no way to physically access the bottom of the tank except during internal inspections. Therefore, to the extent that § 10.3.b is intended to require something more than implementation of one of the leak detection methods listed in the proposed rule it may be impossible to comply with. In light of all of the acceptable methods of leak detection listed in other parts of the regulations, § 10.3.b should be deleted.

b. In connection with §10.3.c, visual inspection should be an acceptable form of leak detection even where the bottom of the tank is not readily accessible, if the tank sits within a containment area on a sufficiently impervious surface as defined in the regulations. In such a case, leaks in the bottom of the tank will be readily visible in the secondary containment area.

c. While it may be possible to adopt one of the listed leak detection methods for existing ASTs, we are skeptical that they will yield sufficiently accurate results. As pointed

out in API Publication 334, the methods listed there are all subject to some interference. In addition, error rates are multiplied with larger tanks. We still believe the best method of leak detection and prevention is the rigorous application of the API Publication 653 inspection protocols. Based on the foregoing, until reliable tests are available for large ASTs, leak detection for these tanks should consist of on schedule industry standard inspections, such as those described in API 653, coupled with frequent visual monitoring of tank dikes and tanks and monthly inventory reconciliation.

d. The discussion below is subject to our general objection that the regulation of piping after the first point of isolation is beyond DEP's authority. Section 8.7.e provides: "[i]f the underground piping conveys a substance under pressure, the piping must be equipped with automatic line leak detectors which alert the operator to the presence of a leak by restricting or shutting off the flow of substances." Section 8.7.e appears to be limited to new piping. In any event, it should be limited to small bore pipe such as that used for retail gasoline outlets. These internal line leak detection systems exist for underground piping at retail convenience stores and gas refueling stations, but have taken over a decade to develop for that application. Based on our research, they do not exist for the larger bore (6" – 12") piping which is used at terminals and refineries. The equipment required by this Proposed Rule does to our knowledge not exist anywhere for terminal or refinery piping. As to the use of a leak detection performance rate for the methods listed by NWGLDE (see § 8.7.e.4), each of those methods appears to be a static leak detection method which may not be considered "an automatic line leak detector" as required by the Proposed Rule. In addition, none of them appear to have the capability of "restricting or shutting off the flow of substances when a leak is detected" as required by § 8.7.e.

III. COMMENTS ON SPECIFIC PROVISIONS OF THE PROPOSED RULE

1. **§ 1.5.c** should be amended by adding "Section 6 (Reporting and Recordkeeping) and Section 13 (Financial Assurance)" to the first sentence and by adding "ASTs which are temporarily out of service are not subject to Sections 5, 6, 8, 9, 10 and 13 unless and until they are certified as fit for service and the owner or operator places them in service for the storage of fluids." It makes little sense to incur all the expenses entailed by those sections for ASTs which are not storing fluids.

2. **§ 2.3** For the reasons stated in Part I, above, add the following sentence to the end of § 2.3:

> All references to ancillary equipment (or any of its components, including those listed above and elsewhere in Title 47, Series 63), AST System, equipment or any other items associated with ASTs, shall include only those components or items up to the "first point of isolation" as that term is defined in W.Va. Code § 22-30-3(3).

3. **§ 2.27** This section defines "impermeable or impervious" to mean a material with "a permeability of less than 1 x 10^{-7} cm/sec." First, we have consulted with a geotechnical engineer who advises that such a level would be very difficult, if not impossible, to meet with native soils in West Virginia. Second, there is nothing in the Act that requires or suggests that DEP should establish a precise, numeric permeability standard. The definition of "secondary containment" in the Act requires the barrier and containment field to be "sufficiently impervious to contain fluids" and for earthen dikes and similar containment structures to be capable of containing fluid "for a minimum of seventy-two hours." W. Va. Code § 22-30-3(17). The Proposed Rule should adopt the same definition of "impermeable" as that contained in the Act.

4 **§ 2.37** The definition of "manifolded tanks" should be changed by adding the following after "substance": "and are operated in such a manner that the multiple tanks

function as one storage unit (i.e., multiple-tank volumes are equalized)." The definition of "manifolded tanks" in the Proposed Rule is inconsistent with the Act's definition of AST to the extent that a "point of isolation" exists between two tank compartments or manifolded tanks. If a point of isolation exists, then aggregation of tank volume is inappropriate.

5. **§ 2.62** Similarly, the definition of "sufficiently impervious" includes a precise, numeric permeability standard of "less than 1 x 10^{-6} cm/sec." Since the Act does not require or even suggest that DEP adopt such a standard, DEP should remove that language from this section.

6. **§ 4.2.a.2.B** All but the first sentence of this section should be deleted. There is no reason to require an owner/operator who is in compliance with an industry standard, such as API 653, to comply with recommendations or suggestions or alternate practices which are not requirements. In addition, the transformation of "should," "may" and "recommends" to "shall" is wrong from a legal standpoint and is akin to the original regulatory overreach (e.g., the statutory term "first point" becomes the last point in the original regulations) which caused the legislature to rewrite the Act.

7. **§ 5.3.e** Add the words "or the American Petroleum Institute" after "manufacturer" in the second line. The schedule recommended by API in API 653 is generally the recognized standard for the frequency of internal tank inspections and is generally followed by those in the industry.

8. **§ 5.4.a.3** The term "[e]xcessive foundation settlement" is an imprecise term. The section should read: "Excessive foundation settlement as determined by a registered professional engineer."

9. **§ 5.5.a** This section should be amended by adding a new second sentence reading as follows:

> Plans submitted to the Secretary pursuant to the Interpretive Rule (47 CSR 62) shall constitute compliance with the requirement to submit a plan.

10. **§ 5.5.b.1.A** The phrase "approved by the Secretary" should be deleted from this section, which states that in lieu of a Spill Prevention Response Plan, the owner or operator of a regulated AST may certify to the Secretary that the AST system is subject to "[a] groundwater protection plan approved by the Secretary." There is no provision in the Groundwater Protection Act, W. Va. Code §§ 22-12-1, et seq., or the Groundwater Protection Regulations, 47 C.S.R. § 58-1, et seq., requiring the Secretary's approval of a GPP. Rather, the regulations provide only that industrial establishments must have a comprehensive GPP, that the GPP must be available on site, and that DEP can review the GPP at any time. *See* 47 C.S.R. §§ 58-4.11 & 4.12.3.

11. **§ 5.5.b.1.D** This section should be deleted. The legislature provided that owners/operators with groundwater protection or SPCC plans need only certify that fact to be in compliance with requirements for a spill prevention and response plan. W.Va. Code § 22-30-9(d). DEP's regulation nullifies the statute for those choosing to comply with the regulatory program through permit modification and should be deleted.

12. **§ 8.2.b.4** Add the following to the end of section: "or a procedure in place to assure appropriate liquid levels are maintained prior to an expected storm which is anticipated to cause flooding of the secondary containment system."

13. **§ 8.2.i.1** This section includes a permeability standard of 10^{-7} cm/sec. As stated above, DEP should not impose a precise, numeric permeability standard but should instead adopt the definition of "impermeable" contained in the Act.

14. **§ 8.3** This section requires upgrades to existing regulated ASTs to be performed "in accordance with the manufacturer's or fabricator's instructions and appropriate industry standards." DEP should change this to read "in accordance with the manufacturer's or fabricators instructions or appropriate industry standards including, but not limited to, API standards."

15. **§ 8.4** This section requires modifications to all regulated ASTs to be performed "in accordance with the manufacturer's or fabricator's instructions, appropriate industry standards, and this Rule." DEP should change this to read "in accordance with this Rule and the manufacturer's or fabricator's instructions or appropriate industry standards including, but not limited to, standards adopted by the API."

16. **§ 8.6** This section requires ancillary equipment up to the first point of isolation to be constructed, designed, installed, and operated "in accordance with the manufacturer's or fabricator's instructions and appropriate industry standards." DEP should change this to read "in accordance with the manufacturer's or fabricator's instructions or appropriate industry standards including, but not limited to, standards adopted by the API."

17. **§ 8.7.a** DEP should clarify that all of Section 8.7.a applies only to new and replacement piping.

18. **§ 8.7.e** *See* Section II above. As noted, we do not believe such a device is available for large bore piping.

This is so for a number of reasons:

a. Thermodynamic movement/flow and expansion of the product in the lines would give false indications of leakage.

b. Every underground line eventually comes aboveground and the exposure to temperature fluctuation and ultraviolet effect on the pipe and its product are reasons the system (if available) would be unreliable until years of research could be conducted.

c. The reason a retail facility is capable of using such a system is because the piping is all underground.

d. The requirement for an automatic reduction or shut-off of flow could cause failure of a large bore pipe under standard operating pressure.

For the reasons stated above, the last sentence of § 8.7.e should be deleted.

19. **§ 10.2.a** To be consistent with the statute, this section should read as follows:

> The owner or operator shall ensure that all regulated ASTs, including piping and dispensing systems up to the first point of isolation, have a secondary containment system that collects and contains an unintentional release from the AST.

20. **§ 10.2.e.1** This section should include embedded geosynthetic clay or other compatible liners and contain a provision allowing for the use of other materials approved by the Secretary. That might be the only way to meet a 1 x 10^{-7} cm/sec permeability requirement.

21. **§ 10.2.f** The last sentence of this section requires new secondary containment structures have a permeability of less than 1 x 10^{-7} cm/sec. As stated earlier, we have consulted with a geotechnical engineer who advises that such a level would be very difficult, if not impossible to meet with native soils in West Virginia. In addition, in most containment areas it would be difficult to use the large compaction equipment necessary to achieve this standard. Given the purpose of secondary containment structures, i.e., to contain a

spill/leak until it can be cleaned up, use of the "sufficiently impervious" standard coupled with a holding time, i.e., 72 hours, would accomplish the objective and avoid significant additional cost. As stated previously, the Proposed Rule should simply adopt the definition of permeability/impervious that is contained in the Act.

22. **§ 10.2.g.1.A** The requirement to remove substances from a Level 1 AST if the secondary containment structure is found to be defective and cannot be immediately repaired should be tempered based on the degree of the defect. This requirement should apply only where there is a "probable, imminent and substantial endangerment to human health and the environment."

23. **§ 10.2.h** The requirement for secondary containment structures of "piping, dispenser and ancillary equipment" should apply only to the first point of isolation.

24. **§ 10.2.i** Amend the last sentence of this section to read as follows:

> When determining the largest AST in a containment area, the combined capacity of manifolded tanks must be considered unless there is a valve or other device which is capable of isolating one tank from the other(s).

The last sentence, as it stands, is ambiguous and could lead to unnecessary and extensive modifications. In addition, it is inconsistent with the statutory limitation on the scope of regulation to the first point of isolation.

25. **§ 10.2.i.2.G** This section should be deleted. The industry standard for dike capacity is one hundred ten percent (110%) of the size of the largest tank, and most tanks subject to the regulation have dikes sized to meet that standard.

26. **§ 10.2.l.1 and 2** The time for upgrading secondary containment is too short. It should be lengthened to the time period for upgrading leak detection.

27. **§ 10.3.b** For the reasons stated in Part II (Leak Detection), above, § 10.3.b should be deleted.

28. **§ 10.3.c** For the reasons discussed under Part II (Leak Detection), above, this section should be amended so as to account for tanks in secondary containment areas. In addition, the requirement for a minimum of 50 foot candles or 100 lumens for visual leak testing is excessive. The standard in API 540 for outdoor bulk storage areas is 0.5 foot candles or 5 lumens. Section 10.3.c should be amended to read as follows:

> Visual testing is an acceptable form of leak detection for regulated ASTs so long as (a) the entire area of concern (e.g. the entire AST, including the AST bottom or aboveground piping, flanges, valves, etc.) is readily accessible for view and properly illuminated by natural or artificial light at the time of the visual inspection or (b) any areas not readily accessible, such as tank bottoms, are located in sufficiently impervious secondary containment areas which are subject to frequent visual inspection for leaks. Visual tests may be performed remotely by using mirrors, cameras or other suitable instruments.

29. **§ 10.3.e** This section should be amended to add two new subsections as follows:

> §10.3.e.8 Inventory control;
>
> §10.3.e.9 Tank testing;

Current subsection 10.3e.8 should be changed to 10.3.e.10. These methods of leak detection should be added because they are recognized in the Act. W.Va. Code § 22-30-5(b)(3).

30. **§ 11 Non-Operational and Temporarily Out of Service Tanks**

Go-Mart and SMRC believe that these classifications should be combined and there should be no prohibition against using a non-operational tank in the future should it pass all required inspections and otherwise comply with the legislative rule. In addition, Go-Mart and SMRC do

not believe that all of the maintenance, corrosion protection, inspection, leak detection and other practices required by the Proposed Rule should apply to temporarily out of service tanks. Each of these tanks would be required to be inspected and certified to be in compliance with the requirements of the legislative rule before being placed into service. Go-Mart and SMRC suggest that it is not necessary to incur the additional expenses required to maintain compliance with these regulations for tanks which are not storing any fluids.

31. **§ 13.2** Add the following to § 13.2:

13.2.g. Proof of assets;

13.2.h. Qualification as a self-insurer;

Renumber "13.2.g" as 13.2.i. The addition of these subsections is appropriate because W. Va. Code § 20-30-7 recognizes these as acceptable mechanisms for financial assurance.

In addition, modify § 13.2.f to read as follows:

13.2.f. Pollution liability insurance covering clean-up costs related to releases from ASTs.

This is more descriptive of the insurance available to cover releases from ASTs.

IV. VIOLATION OF W. VA. CODE § 22-1-39

The Proposed Rule violates W. Va. Code § 22-1-3a because it contains new or amended environmental provisions which are more stringent than counterpart federal programs promulgated by the United States Environmental Protection Agency and the United States Coast Guard.

The EPA regulations are found at 40 C.F.R. § 112 and the Coast Guard regulations are found at 33 C.F.R. subchapter O. The EPA regulations, among other things, impose requirements for spill prevention control and countermeasures and require an SPCC plan.

The Coast Guard regulations impose requirements on bulk oil transfer operations and, among other things, impose requirements for response plans and the testing and operation of marine transfer lines or pipelines.

The Proposed Rule is more stringent than the EPA regulations in the following areas—the scope and use of secondary containment structures, the attributes of secondary containment structures (e.g. size and permeability factors), the scope and accuracy of leak detection methods (e.g. DEP restrictions on the use of visual inspections and equipment and facilities regulated).

The proposed rule is more stringent than the Coast Guard regulations in the area of required testing and leak detection for underground transfer piping.

GO-MART, INC.

Sam Heater, Treasurer

ST. MARYS REFINING COMPANY

Sam Heater, Treasurer

INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC.

COMMENTS ON PROPOSED LEGISLATIVE RULE
47 C.S.R. 63 – ABOVEGROUND STORAGE TANKS

The Independent Oil and Gas Association of West Virginia, Inc. ("IOGA") respectfully submits its comments to the proposed legislative rule 47 C.S.R. 63 titled "Aboveground Storage Tanks," as filed with the West Virginia Secretary of State on June 25, 2015 (the "Proposed Rule") as follows:

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 the West Virginia Department of Environmental Protection ("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.

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. 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 significant risk of adversely impacting public water supplies or valuable water resources.

It is IOGA's understanding that perhaps over 60% of the registered ASTs and "regulated" ASTs are utilized in 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 (50-210 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 Aboveground Storage Tank Act ("AST Act"), W. Va. Code §§ 22-30-1 *et seq.*, as amended pursuant to Senate Bill 423, the Legislature instructed WVDEP to develop a regulatory program for new and existing aboveground storage tanks and secondary containment that "**takes into account the size, location and contents of the tanks and sets out tiered requirements for regulated tanks.**" W. Va. Code § 22-30-5(a) (emphasis supplied). IOGA acknowledges and appreciates that the regulatory program is more limited for ASTs that are not located in a zone of critical concern ("ZCC") or zone of peripheral concern ("ZPC") and do not otherwise qualify as regulated Level

1 ASTs. However, IOGA believes that the Proposed Rule continues to ignore that statutory mandate by imposing unduly burdensome and duplicative regulatory requirements on all regulated tanks without adequately taking into account the size, location and contents of the ASTs used in oil and gas operations in the ZPC, or to adequately consider the cost of compliance with the Proposed Rule for these oil and gas industry tanks relative to the limited environmental and public health benefits that can be achieved. In fact, IOGA notes that there are very few substantive differences between the requirements in the Proposed Rule for regulated Level 1 ASTs and regulated Level 2 ASTs despite the clear legislative directive that "Level 1 tanks shall be regulated to a higher standard of tank and secondary containment integrity . . . ." W. Va. Code § 22-30-5(a).

As it has stated throughout this process, IOGA supports reasoned and focused implementation of the AST Act. However, IOGA has many significant concerns regarding WVDEP's proposed interpretation and implementation of the statute, as reflected in the Proposed Rule.

1. The Economic Impact of the Requirements Imposed by the Proposed Rule will be Unmanageable for Many Smaller Operators

The Proposed Rule would impose unnecessary and unreasonable burdens on oil and gas operators' use of ASTs that have long been a safe element of their operations. For many smaller operators within the state, the economic impact of the requirements in the Proposed Rule will be devastating, and this consequence appears to have been either unrealized or simply ignored by WVDEP despite IOGA's repeated comments to WVDEP. Simply put, the Proposed Rule will force some as-yet-undetermined number of operators to cease doing business, file for bankruptcy protection, reduce workforce, discontinue investment in West Virginia and/or implement an alternative business model to avoid the unbearable economic impact of the Proposed Rule on ASTs designated as regulated Level 1 or regulated Level 2 ASTs. The costs to comply with the Proposed Rule for each regulated AST can reasonably be expected to range from $2,000 to $10,000 for administrative, inspection and certification, and upgrade requirements. These impacts are not exaggerated particularly during periods of historically low prices for natural gas as currently exists. While these comments propose various changes to the Proposed Rule that will help alleviate some of this impact on smaller oil and gas operators without sacrificing protection of public health and the environment, IOGA urges WVDEP to carefully consider minimizing, and eliminating to the extent possible, the regulatory burdens on ASTs containing oil or brine water having a capacity of 400 barrels or less.

In addition, the fiscal note included with the Proposed Rule fails to address the economic impact of the Proposed Rule on persons affected by the rules and regulations as required by statute. W. Va. Code § 29A-3-5, by reference to § 29A-3-4(b), requires a proposed rule to have "a fiscal note attached itemizing the cost of implementing the rules as they relate to this state **and to persons affected by the rules**." (emphasis added). The DEP should evaluate the economic impact imposed by the Proposed Rule on "persons affected by the rules," including the regulated community. The failure to consider and evaluate the economic impact on the regulated community can be expected to result in unreasonably costly regulatory requirements compared to

the perceived benefit to be created. IOGA urges DEP to perform the statutorily required economic analysis and resubmit the Proposed Rule with an appropriate fiscal note.

2. The Adoption of One-Size-Fits-All Requirements for Regulated Level 1 ASTs and Regulated Level 2 ASTs is Arbitrary and Capricious

Significantly, the Proposed Rule imposes substantively identical standards on regulated Level 1 ASTs and regulated Level 2 ASTs. This constitutes a failure by WVDEP to craft a rule that adequately considers—and **reflects**—the varying size, contents and location, as expressly required by the AST Act by the language "Level 1 tanks shall be regulated to a higher standard of tank and secondary containment integrity." W. Va. Code § 22-30-5(a). The **only** differences between the requirements imposed on Level 1 and Level 2 regulated ASTs appear to be timeframe-based. For example, regulated Level 2 ASTs are permitted an extra six months to implement required upgrades to ASTs (other than upgrades to secondary containment, where the proposed compliance period is the same for Level 1 and Level 2 regulated ASTs). Regulated Level 2 ASTs would also be given an extra two years between inspections by a registered professional engineer, API-certified inspector or STI-certified inspector. However, the same substantive requirements are imposed on a 5,000-gallon tank containing produced brine water as a 40,000-gallon tank containing a substance included on the List of Lists as described in § 22-30-3(13)(B) of the AST Act. Imposing the same regulatory burdens and costs on both tanks cannot be reasonably justified when comparing the cost to the regulated community and the minimal risk to public water supplies. A "one-size-fits-all" solution does not work. Accordingly, the Proposed Rule should be restructured to reflect the relative risks to public surface water supply intakes and avoid imposing duplicative and unnecessary regulatory requirements on the thousands of oil and brine tanks categorized as regulated ASTs used in oil and gas production throughout West Virginia that pose no significant risk of harm.

3. The Definitions of the Terms "Aboveground Storage Tank System," Appears to Improperly Expand the Scope of the Statute

The definition of "aboveground storage tank system" appears to expand the definition of "aboveground storage tank" in the AST Act. The Proposed Rule creates a new term, "aboveground storage tank system," which significantly expands the universe of equipment subject to regulation. *See* § 2.2 (defining "aboveground storage tank system" as "an [AST] as defined by W. Va. Code § 22-30-3(1), its piping, and all its ancillary equipment, including dispensing systems, spill containment devices, overfill protection devices, secondary containment systems, and any associated release detection equipment up to the first point of isolation"). The Proposed Rule should be clarified further that "piping, and all its ancillary equipment, including dispensing systems, spill containment devices, overfill protection devices, secondary containment systems, and any associated release detection equipment" is NOT part of the AST or AST system if such piping, equipment, device or system is located beyond the "first point of isolation." The terms "AST" and "AST system" often appear to be used inconsistently and interchangeably throughout the Proposed Rule.

4. The Proposed Rule Fails to Adequately Distinguish Between "Regulated" ASTs and ASTs Subject to Registration But Not Regulation

The AST Act applies to all ASTs in only limited respects. Specifically, § 4 "Inventory and registration of existing aboveground storage tanks," § 8 "Corrective action," § 11 "Required Signage," § 14 "Public access to information," § 15 "Inspections, monitoring and testing," § 16 "Administrative orders; injunctive relief," § 17 "Civil and criminal penalties," and § 22 "Imminent and substantial danger" of the AST Act contain provisions governing all ASTs as defined therein. Thus, only the portions of the Proposed Rule implementing those sections may apply to all ASTs.

On the other hand, all of the AST Act applies to "regulated Level 1 ASTs" and "regulated Level 2 ASTs," which may collectively be referred to as "regulated ASTs." The Proposed Rule fails to properly distinguish between those requirements that are applicable to all ASTs and those requirements that are applicable to regulated ASTs. More specifically, §§ 3.1.c.2, , 3.6, 4 and 8.2.f of the Proposed Rule must be clarified concerning applicability to regulated ASTs or registration-only ASTs. This distinction is important and impacts more than 30,000 registration-only tanks throughout the State.

5. Spill Prevention Response Plans

Because § 5.5.a sets December 9, 2015 as the deadline for submitting a Spill Prevention Response ("SPR") Plan and the Interpretive Rule (47 C.S.R. 62) authorized the submission of a SPR Plan, or substitute in lieu thereof, to the WVDEP in December 2014, IOGA requests that the Proposed Rule expressly provide that submission of a plan in compliance with the Interpretive Rule fulfills the requirement in § 5.5.a and is subject to updating in accordance with § 5.5.a.1, or in the event of an occurrence of a circumstance described in § 5.5.a.2.

In addition, IOGA urges WVDEP to add spill prevention plans developed in accordance with the requirements of 35 C.S.R. 1-9 to § 5.5.b.1 as an "in lieu" option to a formal SPR Plan along with groundwater protection plans ("GPP") (§ 5.5.b.1.A) and spill prevention control and countermeasures ("SPCC") plans (§ 5.5.b.1.B). To the extent that an operator has developed a spill prevention plan that conforms to the requirements of 35 C.S.R. 1, such plan should also be acceptable in lieu of a SPR Plan on the same terms as a GPP or SPCC plan.

All 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.

Simply put, protective measures are in place to safeguard waters of the State against releases from ASTs utilized by the oil and gas industry, and, as noted above, these practices have proven successful across decades of experience. Thus, IOGA urges WVDEP to also accept spill prevention plans developed in accordance with 35 C.S.R. 1 in lieu of a SPR Plan and modify the Proposed Rule accordingly.

6. Tank Signage Requirements Should Be More Flexible

The requirements of W. Va. Code § 22-30-11 "Required signage" became effective on June 12, 2015, and WVDEP directed all AST owners and operators to comply with the language of the AST Act. Thus, over 40,000 ASTs have or should have signage in place based on the language contained in § 11 of the AST Act. Requiring all AST owners to revise labels or signs that were developed in good faith compliance with the AST Act is unreasonable and unnecessary. IOGA requests that §§ 5.6.b, 5.6.c and 5.6.d be deleted from the Proposed Rule. First requiring labels or markings to be visible and legible from a distance of 25 feet may be reasonable, but requiring that labels or markings be visible from a public roadway or public right-of-way is unreasonable and unrealistic for oil and gas ASTs which are largely located in remote areas with no public access nearby. The "containment area" is undefined and variable making that term an inappropriate standard as well. IOGA requests that the label, markings or signs be designed to be "reasonably visible based on the topography and development of the area in which the AST is located." This provides general guidance without imposing unreasonable or impossible requirements. Section 5.6.c is an operational requirement that does not belong in the "Labeling and signage requirements" section and § 5.6.d applies to permanently closed ASTs which are no longer ASTs within the definition of the AST Act because they are no longer "made to contain an accumulation of more than" 1,320 gallons of fluids. In any event, if the

specific signage requirements of § 5.6 are to be retained, its applicability should be limited to **regulated** ASTs.

7. The Requirement to Prohibit All Vegetation In New Dikes Is Unnecessary

Section 10.2.i.4 provides that "[f]or dikes installed after the effective date of this Rule, the area within the dike must be kept free of **all vegetation**, debris, and any other material not necessary to the operation of the facility." The exclusion of all vegetation is inappropriate and counterproductive. Light vegetation, but not woody or other deep rooted vegetation, inside the diked area helps to minimize erosion and stabilizes the diked area without undermining the effectiveness of holding fluid for a minimum of 72 hours as required by the definition of secondary containment which expressly authorizes "earthen dikes." W. Va. Code § 22-30-3(17).

8. The Area of the Zone of Critical Concern Should Be Based on Mapping Available on June 12, 2015

WVDEP notified AST owners regarding which registered ASTs were located in a ZCC in accordance with the AST Act. The definition of ZCC has not changed, except for the removal of the area ¼ mile downstream from a public water supply intake location, and the regulatory requirements associated with ASTs in a ZCC are significant. IOGA believes that WVDEP can and should provide public notice and opportunity to comment on any modification of the area contained within a ZCC on or after June 12, 2015. Because significant regulatory and economic consequences arise when an AST is designated as being in a ZCC, the AST owners should be afforded the right to evaluate and comment on any changes to a ZCC before such changes are adopted and implemented by WVDEP.

B. Comments on Specific Provisions

1. Definition of "Aboveground Storage Tank System" [§ 2.2].

IOGA requests that "aboveground storage tank system" be deleted. The AST Act does not regulate systems, it regulates ASTs. The term AST as set forth in the AST Act should not be expanded to encompass ancillary equipment such as secondary containment, piping beyond the first isolation valve, etc. Piping beyond the first point of isolation is not regulated under the AST Act

2. Definition of "Impermeable or Impervious" [§ 2.27] and "Sufficiently Impervious" [§ 2.62]

The definition of "impermeable or impervious" is inconsistent with the definition of "sufficiently impervious." *See* §§ 2.27 and 2.62. The definition of impermeable or impervious should be deleted or modified to conform to the definition of sufficiently impervious.

3. Definition of "Mobile Tank" [§ 2.39]

The definition of "mobile tank" included in the Proposed Rule conflicts with the use of "mobile device" in the AST Act, and is overly broad and internally contradictory. The AST Act provides that only those "mobile devices" "which remain in one location on a continuous basis for three hundred sixty-five or more days" constitute ASTs regulated under the statute. W. Va. Code § 22-30-3(1). The second sentence of the definition should be deleted as it unreasonably restricts the definition of mobile tank on arbitrary bases and limits the operational flexibility of an owner or operator. Whether a mobile tank is connected to stationary piping or placed on "saddles, legs, stilts, rack or cradle" does not determine whether the tank is "designed and constructed to be moved to different service locations, and its relocation is inherent in its use." In addition, some field erected tanks are designed and intended to be mobile by assembly, disassembly and reassembly at different locations. Whether a tank is on saddles, legs, stilts, rack, cradle or field assembled does not disqualify the tank as a mobile tank under the AST Act.

4. Manifolded Tanks [§ 3.1.b]

The Proposed Rule defines "manifolded tanks" as "two or more tanks connected by piping which collectively contain the same type of substances." § 2.37. For purposes of assessing eligibility under the AST Act, the Proposed Rule requires that the total capacity of all manifolded tanks be aggregated to determine whether the volume exceeds 1,320 gallons, "unless the tanks are connected in a manner that prevents fluids flowing from one tank to another **under any conditions**." § 3.1.b. Once again, this constitutes an expansion of the statutory definition of "aboveground storage tank." Under that definition, an individual AST extends only up to the first point of isolation. Accordingly, manifolded ASTs should be regulated as a single "AST" only to the extent that no point of isolation exists between the tanks. IOGA requests that the definition of "manifolded tanks" be revised as follows: "means two or more tanks connected by piping which are designed to operate as one container and collectively contain the same fluids, but does not include multiple connected tanks equipped with manual or electronic valves, check valves, or shut-off devices that are designed to prevent the flow of fluids between the tanks." IOGA suggests that WVDEP should encourage the use of smaller tanks "manifolded" in a way to protect against overfilling of a tank, but designed in a way to assure that a leak in one tank does not result in draining other "manifolded" tanks. Such a policy is more protective of the environment without the administrative and cost burden of characterization as a regulated AST.

5. Notification of Installation is Unnecessary [§ 3.4]

The requirement to complete an "AST Installation Application Form" is unnecessary and beyond the scope of the AST Act. The AST Act requires registration of ASTs, but does not provide for advance notification and approval by application. *See,* § 5(b). The AST owner will not necessarily know prior to construction whether the AST is "regulated" or not. Since the ZCC and ZPC mapping are not publicly available, the information to determine whether or not to file an installation application may not be known. Moreover, § 3.4 is redundant with the requirements to register the AST on a form prescribed by WVDEP which must be performed prior to filling or operating the AST. The same information can be provided in the registration process and eliminate the unnecessary step of completing and submitting an application form.

6. Transfer of Ownership [§ 3.6]

Several requirements under the Proposed Rule are triggered by a change of ownership of an AST. First, a completed Change of Ownership Form must be submitted within 30 days after transfer of ownership. § 3.6. Significantly, the new owner may not operate the AST until it is properly registered, the appropriate fees have been paid if due, and a certificate to operate has been issued to the new owner for the AST. § 3.6.b. Because AST transfers may occur while tanks are still in service, these provisions are simply unworkable as a practical matter. To the extent that an AST is in use on the date of transfer, the new owner arguably would be in non-compliance immediately, as the registration amendment will not have been submitted (indeed, it would not even be due yet) and a certificate to operate would not have been issued to the new owner. Accordingly, IOGA requests clarification that, to the extent that an AST was properly registered by the prior owner and a corresponding certificate to operate had been issued, the new owner may continue to use and operate the AST following the transfer of ownership, subject only to updating the registration information and paying the AST transfer fee described in proposed 47 C.S.R. 64. Any contrary requirement would result in a needless disruption of the operations of the new AST owner, ostensibly requiring it to halt the use of the tank (and empty it?) while this transition paperwork is pending. Such a result is unnecessary and unreasonable. In addition, § 3.6 should be expressly limited to regulated ASTs because it requires a certificate to operate and only regulated ASTs require a certificate to operate.

Finally, the above issues are compounded by language in the Proposed Rule providing that "**[a]ny** change in the corporate or business structure of the aboveground storage tank owner which affects the legal name of the tank owner constitutes a transfer of ownership that requires notification to the Secretary." § 3.1.f (emphasis supplied). This language should be modified to delete the phrase "constitutes a transfer of ownership that." The amended language would require notification of any name change without disruption in the continuity of operation of an AST. Simply put a name change of a corporation through amendments to articles of incorporation or a merger does not constitute a "change in ownership" affecting legal responsibility for ASTs.

7. Certificates to Operate and Permits/Plans [§ 4]

IOGA supports WVDEP's proposal to avoid an onerous site- or tank-specific permit application and issuance process through the use of certificates to operate based on the information provided in individual AST registrations, as this approach will reduce the administrative burden on both the agency and the regulated community. Of course, § 4 must be expressly limited to regulated ASTs in accordance with the AST Act. W. Va. Code § 22-30-5.

Section 3.1.c.2 of the Proposed Rule provides that, unless otherwise authorized by the Department in writing, fluids may not be placed in an AST and an AST may not be operated until that tank has been properly registered, the applicable registration fee has been paid, **and a certificate to operate has been issued** for the AST. Since the certificate to operate only applies to regulated ASTs, § 3.1.c.2 must not be applied to "registration-only" ASTs. Moreover, this provision is unreasonably burdensome, as Section 4 of the Proposed Rule appears to prescribe no

timeframe for issuance of these certificates to operate by WVDEP. Requiring AST owners and operators to suspend the use of tanks for an indeterminate period is unreasonable and infeasible in practice, particularly where the use of an AST is critical to the operations of the owner or operator (e.g., commencing production of a new oil or gas well). IOGA suggests that a certificate to operate automatically issue upon registration and payment of the registration fee for regulated ASTs, unless otherwise instructed by WVDEP.

8. Siting Requirements [§ 4.3]

It is IOGA's understanding that the siting requirements of § 4.3 of the Proposed Rule would apply only to "new ASTs," which are defined as those tanks "for which physical installation began on or after the effective date of this Rule." § 2.40. With regard to the provision requiring compliance with applicable setback and distance requirements of the local jurisdiction and State Fire Marshal, IOGA notes that these requirements are already established and in place pursuant to existing authorities, and compliance therewith should not be imposed by WVDEP through unnecessary duplication in the Proposed Rule. § 4.3.a. The Proposed Rule also would establish a new requirement to maintain a minimum spacing of three feet between tanks and between tanks and dike walls. This requirement is not only arbitrary, but it is in direct conflict with current construction standards for well pads, which strive to minimize the surface area impacted by drilling operations. Moreover, at existing locations where space may be limited, maintaining spacing of at least three feet may be impossible. Similarly, adopting a blanket requirement that new ASTs may not be located above underground utilities or directly beneath overhead power lines may prove infeasible in some locations based on the existing infrastructure. In addition, the requirement of a professional engineer's construction design criteria and engineering specifications for a location "with karst topography" is vague and unreasonable since "karst topography" is not a defined term and cannot be readily identified. Accordingly, IOGA suggests the deletion of Section 4.3 of the Proposed Rule in its entirety. The adoption of one-size-fits-all siting restrictions to be applicable to every future regulated AST discounts the innumerable site-specific considerations that may arise and goes beyond the scope of WVDEP's authority under the AST Act.

9. Routine Maintenance Inspections [§ 5.1]

The Proposed Rule would require the owner or operator to ensure that visual inspections of the secondary containment are performed, at a minimum, once every 7 days for Level 1 ASTs. § 5.1.a. Again, the requirement should be expressly limited to "regulated Level 1 ASTs." For oil and gas industry tanks containing brine or oil, for example, this monitoring frequency is excessive, particularly where secondary containment is in place that is designed to prevent any release to the environment. As a practical matter, moreover, a 7-day inspection cycle raises significant operational and staffing concerns, as inspectors may be required to perform tank inspections up to five times in a month (again, with no corresponding environmental benefit if secondary containment is in place to prevent a release from an AST). Once again, the one-size-fits-all approach to AST regulation adopted by WVDEP in the Proposed Rule discounts measures that are already in place to protect against spills and would impose unreasonably burdensome requirements on AST owners. IOGA suggests that Section 5.1.a of the Proposed Rule be revised to require visual inspections of regulated ASTs and related secondary

containment once per calendar month, and no more frequently than once per week for regulated Level 1 ASTs containing fluids on the List of Lists in a concentration of one percent or greater, excluding petroleum.

Additionally, IOGA notes that the requirement that this inspection include "[a] check of the facility to ensure that no potential hazardous environmental conditions exist" is overbroad. § 5.1.a.1; *see also* § 2.23 (defining "facility"). WVDEP should revise this language by tailoring it to focus on the regulated ASTs located at a particular facility, and any hazardous environmental conditions that may be associated therewith.

IOGA also notes that § 5 does not clearly limit the scope of the section to **regulated** Level 1 and Level 2 ASTs which language should be clarified. In addition, the use of the term "AST system" should be defined as encompassing only regulated Level 1 and regulated Level 2 ASTs.

10. Inspection and Certification [§ 5.2]

IOGA requests WVDEP to incorporate into the Proposed Rule a streamlined and reasonably priced program through which individuals may obtain certification to perform AST inspections and certifications as referenced in § 5.2.a.4 of the Proposed Rule. The program approved should be less time consuming and less costly than the week long class at a cost of $1,750 offered by the Steel Tank Institute.

As a more appropriate alternative to the inspection and certification requirements for regulated Level 2 ASTs, IOGA urges WVDEP to expressly authorize oil and gas operators to inspect and certify regulated Level 2 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 each year. This inspection and certification on Form OP-13, titled "Operator's Annual Inspection Form," should be approved as fulfilling the requirements of the Proposed Rule if submitted to WVDEP by March 31 of each calendar year following the effective date of the Proposed Rule.

11. Internal Inspections [§ 5.3]

The Proposed Rule appears to require that "formal internal inspection of ASTs installed prior to June 12, 2015 shall be performed in general accordance with requirements of STI SP001 or API 653, as applicable to the AST being inspected, and at a minimum shall include evaluation of the following . . . ." § 5.3.a. Because STI SP001 does not require internal inspections of tanks having a capacity of less than 30,000 gallons if periodic leak testing is performed, IOGA requests that Section 5.3.a of the Proposed Rule be revised as follows to clarify that internal inspections are not required for regulated ASTs having a capacity of less than 30,000 gallons:

> "For regulated ASTs installed prior to June 12, 2015, formal internal inspection of a regulated AST having a capacity of 30,000 gallons or greater shall be performed to the extent required pursuant to STI SP001 or API 653 and shall, at a minimum, include evaluation of the following:"

Similarly, IOGA requests that the same modification be made to Section 5.3.b. relating to new regulated ASTs having a capacity of less than 30,000 gallons. Smaller tanks are not designed to accommodate physical entry for internal inspection which is recognized in STI SP001. Worker safety issues should limit the internal inspection requirements in § 5.3.

IOGA also objects to the conditions contained in §§ 5.3.b.1.B, C, D and E in order to qualify for an exemption from internal inspection for smaller new regulated ASTs. Again, a 200 barrel oil or brine tank in a ZCC inside an earthen dike secondary containment should not be subject to an internal inspection if regular monthly and annual evaluations/certifications are performed.

12. Release Investigation and Corrective Action [§§ 6.2, 6.3 and 7]

Sections 6.2, 6.3 and 7 of the Proposed Rule set forth elaborate requirements relating to release investigation and corrective action that are extremely complicated and at times internally contradictory. In the event of a release or spill event, it is imperative that tank owners and operators be able to identify their response obligations in a timely and efficient manner. As currently proposed, however, the Proposed Rule makes that evaluation quite difficult. Further, many of the requirements specified in Section 7 of the Proposed Rule appear excessive in the event of a minor release (e.g., within a facility that is easily cleaned up). IOGA urges WVDEP to review these sections of the Proposed Rule carefully and attempt to further streamline them as much as possible, especially in connection with minor spills that do not enter waters of the State.

13. Temporarily Out of Service ASTs [§ 11.2]

The classification of an AST as "temporarily out of service" under the Proposed Rule triggers a number of requirements—namely, inspection of secondary containment, tightness testing for piping, and other checks—before that tank can be returned to service. *See* § 11.2.b. IOGA requests that WVDEP revise the definition of "temporarily out of service" to expressly state as follows: "The shutting-in or workover of an oil or natural gas well shall not render any of its associated aboveground storage tanks 'temporarily out of service' for purposes of this Rule during the period that the well is shut-in or work is being performed on the well." The length of time a well is shut-in may not be within the operator's control based upon pipeline capacity or market limitations. The proposed language would simply clarify that such suspension in production which may be outside the operator's control will not trigger a change in the status of an AST.

14. Delivery Prohibition [§ 12.1]

Section 12.1 of the Proposed Rule would render product deliverers/transporters, including persons who approve delivery orders, liable for the delivery of fluid into an AST that the owner or operator could not demonstrate is in compliance with the applicable requirements for registration, annual registration fee assessments and financial responsibility requirements. § 12.1. Of course, there is no annual registration fee assessment in the AST Act or Proposed Rule. Significantly, when passing the AST Act, the Legislature considered **and rejected** the

inclusion of a similar requirement in the statute. As WVDEP is aware, the burden already falls on the owner or operator of the AST to comply with the various requirements of the AST Act and its implementing regulations—there is simply no reason to require the paperwork for each tank to be made available for every delivery to that tank, or to punish the delivery person if (s)he unloads without the proper paperwork. This is not similar to the Underground Storage Tank program, where the tanks to be filled almost always will be right next to the station or store that they serve. It should be sufficient to hold owners and operators accountable for complying with the program, and not place an unfair burden upon delivery persons. Accordingly, IOGA urges WVDEP to delete Section 12.1 in its entirety, and make corresponding revisions to the remainder of Section 12 to remove all references to the delivery prohibition. Also, reference to "subsection 14.1" in § 12.2.a should be "subsection 12.1."

15. Financial Responsibility Requirements [§ 13]

The Proposed Rule imposes a financial responsibility requirement on AST owners or operators based upon the aggregate storage capacity for the tank or tank facility, but subject to a $5,000 minimum for the tank or tank facility. § 13.1. The "one-size-fits-all" approach disproportionately impacts the oil and gas industry. The financial responsibility requirement as described in the Proposed Rule would be unattainable for many small producers who are unlikely to be able to obtain insurance coverage or have the liquidity to utilize cash collateral based security. Again, IOGA requests that the bond program, including the blanket bond program, available pursuant to Articles 6 and 6A of Chapter 22 of the W. Va. Code be recognized and accepted as compliance with the financial responsibility requirements of the Proposed Rule.

As stated above, the tanks utilized by oil and gas operators primarily range in size from 50 to 210 bbls. Most oil and gas operations utilize one or two tanks at a producing well site. Thus, the risk to public water supplies associated with a release from a single tank is very small and the referenced existing bond programs are adequate.

IOGA also notes that the proposed financial responsibility requirement is disproportionately harmful to owners, like oil and gas operators, that have one small AST located at many different sites. For example, an operator who owns 100 regulated Level 2 ASTs, each with a storage capacity of 100 barrels and each at a different well site, would have a financial responsibility requirement of $500,000 based on the $5,000 minimum per tank or tank facility. In contrast, an operator with the same number and capacity of regulated Level 2 ASTs all at one facility would have a financial responsibility requirement of $42,000 (420,000 gallons x 10¢). The operator with 100 well sites is responsible for a financial responsibility requirement that is nearly **12 times** that of the single facility operator despite the fact that the risk of catastrophic release from a single facility with the same storage capacity is greater than the risk of release from any single well site.

If the existing bond programs are not utilized as requested above, IOGA strongly urges that WVDEP modify the definition of "facility" at § 2.23 of the Proposed Rule by inserting at the end of the second sentence the following: "and section 13 'Financial Responsibility Requirements.'" This change will alleviate an unreasonable additional cost to oil and gas operations based upon an arbitrary financial assurance requirement that would impose the same

cost on a 1,320-gallon regulated Level 2 AST as a 50,000-gallon regulated Level 2 AST at a single location.

IOGA also requests that § 13.2.f. be amended by deleting the words "for performing corrective action" in order to allow the use of insurance for the general financial responsibility obligation established in section 13 of the Proposed Rule.

C. Other Suggested Modifications to the Proposed Rule

1. § 3.1.c.1 – The word "timely" should be deleted. The prerequisites for storing substances should be registration and payment of registration fee. Whether the payment is timely or not should not preclude storage of materials once the registration fee is paid.

2. § 3.1.c.2 – The requirement in the second sentence that "fluids may not be placed in the tank and the tank may not be operated until the tank is properly registered in the new tank owner's name, the registration fee has been paid, and a certificate to operate has been issued" should be limited to "regulated tanks" since non-regulated ASTs are not subject to a certificate to operate requirement.

D. Conclusion

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

Respectfully Submitted,

INDEPENDENT OIL AND GAS ASSOCIATION
OF WEST VIRGINIA, INC.

July 30, 2015

INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, INC.

COMMENTS ON PROPOSED LEGISLATIVE RULE
47 C.S.R. 64 – RULES GOVERNING
ABOVEGROUND STORAGE TANK FEE ASSESSMENTS

The Independent Oil and Gas Association of West Virginia, Inc. ("IOGA") respectfully submits its comments to the proposed legislative rule 47 C.S.R. 64 titled "Rules Governing Aboveground Storage Tank Fee Assessments," as filed with the West Virginia Secretary of State on June 25, 2015 (the "Proposed Fee Rule") as follows:

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 the West Virginia Department of Environmental Protection ("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.

A. General Comments

IOGA requests that the Proposed Fee Rule conform to the definitions contained in the Aboveground Storage Tank Act ("AST Act") as stated in § 2 of the Proposed Fee Rule. Specifically, the Annual Operating Fee and Annual Response Fee apply only to a "regulated aboveground storage tank" as defined in § 22-30-3(15), which includes "an AST that meets the definition of a level 1 or level 2 regulated tank." Accordingly, references to Level 1 and Level 2 ASTs or tanks should be clarified to be "regulated Level 1 AST" or "regulated Level 2 AST" in §§ 3.2.a, 3.2.a.1, , 3.2.a.2, 3.3.a, 3.3.b and 3.4.c,

IOGA agrees with the transfer fee provided in § 3.1.b, but requests that the language be clarified that the transfer fee apply to both the amended registration and transfer of the related certificate to operate. The Aboveground Storage Tank Rule (47 C.S.R. 63) should be similarly clarified in § 4 thereof that an ownership change is effective upon the completion of an amendment to the AST registration and payment of the transfer fee provided in the Proposed Fee Rule and that the certificate to operate transfers with the registration to the new owner. No additional registration fee should be assessed on the ownership transfer.

B. Comments on Specific Provisions

1. The Annual Operating Fee For Level 1 Tanks Should Be Varied Based On The Size and Contents of the AST [§ 3.2.a.1.]

The operating fee for Level 1 ASTs of $201.00 is disproportionately large for oil and gas industry tanks, many of which have a capacity of 4,200-8,820 gallons and contain brine water or oil. Imposing the same fee for small ASTs containing innocuous fluids as for 50,000-100,000 gallon ASTs is hardly fair or equitable. IOGA suggests that Level 1 ASTs containing brine water or oil having a capacity of 10,000 gallons or less be treated as Level 2 ASTs for purposes of assessing fees.

2. The Fee Assessment Invoice Should Be Mailed To Each AST Owner [§ 4.1]

Section 4.1 should expressly provide that any invoice for fee assessment will be delivered by United States mail to the owner's address based on the AST registration information. Any alternative means of communication is inadequate to place an AST owner on notice of the fee assessment.

3. Each AST Should Be Assessed Separately [§ 4.2]

Section 4.2 should be clarified to authorize owners to pay the assessed fee for each AST separately or specific groups of ASTs. AST owners should be able to pick and choose which ASTs are paid in full in the event that an owner is unable to timely pay the full fee on all ASTs owned by that owner.

4. Fee Assessment Invoices Should Expressly Provide AST Owners 60 Days By Which To Make Payment [§ 4.3]

IOGA urges WVDEP to modify the Proposed Fee Rule to allow AST owners at least 60 days from the invoice mailing date by which to pay the assessment fees. Because many AST owners own scores or hundreds of ASTs, they should be afforded an adequate amount of time to acquire the necessary liquidity to pay the fees assessed.

5. Errors Should Be Identified and Communicated [§ 4.4c]

The last sentence of § 4.4c requires that "errors not identified within one year" be deemed waived. IOGA suggests that following the word "identified" the words "and communicated in writing to the AST owner or the Secretary as appropriate" be inserted to clarify that the error must not only be identified but also be communicated to the entity who committed the asserted error.

6. Failure To Comply With The Proposed Fee Rule Does Not Automatically Result In A Penalty [§ 6.1]

Section 6.1 states that "a tank owner who does not make a full, timely payment of fees assessed . . . is subject to the penalties provided in" Section 17 of the AST Act. This language should not suggest that the elements of a violation under the AST Act are not applicable. IOGA questions whether a failure to pay a fee assessment constitutes a violation of § 22-30-17 at all and requests that § 6.1 be deleted. At a minimum § 6.1 should be modified to state that a tank owner "may be subject to the penalties if a violation of the AST Act is determined to have occurred after notice and opportunity to address the alleged violations."

7. A 50% Penalty For Late Payment Is Unreasonable [§ 6.2]

IOGA suggests that a 50% penalty for late payment of assessed fees is simply exorbitant and unduly punitive. Certainly such an excessive penalty in addition to other remedies included in the Proposed Fee Rule is unnecessary and inappropriate. A late fee of 5% of the unpaid balance is more reasonable and consistent with normal commercial transactions. Assessing a penalty of $100.50 per regulated Level 1 AST for slow pay by an owner having cash flow issues simply exacerbates the payment problem and, if paid, results in an unnecessary windfall to WVDEP.

8. Unpaid Fees Should Not Transfer To A New Owner [§ 6.6]

Section 6.6 states that "the unpaid fee balance shall transfer to the new owner." IOGA urges WVDEP to limit the transfer of any unpaid balance to those circumstances in which a certificate to operate is transferred. WVDEP may wish to consider encouraging the transfer of ASTs to new owners, especially in the event an AST owner becomes unlocatable. The transfer of an AST to a new owner capable of properly operating the AST and paying assessed fees without the burden of delinquent fees assessed against the prior owner should be encouraged not discouraged.

9. An Automatic Inflation Adjustment Is Unnecessary [§ 7.1]

IOGA requests WVDEP to provide a rationale for imposing an automatic inflation adjustment for the assessed fees when the amount of fees needed by WVDEP may very well decline as the AST Act is implemented and results in protection of public water supply intakes as intended by the law. More particularly, the Annual Response Fee should be excluded from § 7 entirely since the amount of the Annual Response Fee is to be calculated each year to achieve a $1 million balance in the Protect Our Water Fund. Accordingly, no inflation adjustment is appropriate for the Annual Response Fee.

Lastly, in § 6.4 at the end of the first line the word "my" should be "may."

C. 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.

July 30, 2015

Sizemore, Joe M

From: DEP Comments
Sent: Thursday, July 30, 2015 2:34 PM
To: Sizemore, Joe M
Subject: FW: Above Ground Storage Tanks Comments

-----Original Message-----
From: gibbins [mailto:gibbins@frontier.com]
Sent: Thursday, July 30, 2015 2:14 PM
To: DEP Comments <DEP.Comments@wv.gov>
Subject: Above Ground Storage Tanks Comments

The League of Women Voters of West Virginia appreciates the opportunity for citizens to make comments on the AST rules. We added our name to the WV Rivers Coalition's comments.

Under 47-63-5, we especially like
Strengthening the rules on the SPRP plans. It is important for utilities to be kept in the loop.
Reinstating the relationships with the Bureau of Public Health, county and municipal emergency agencies, and public water systems is necessary for the development of the Source Water Protection Plans. The BPH is helping utilities develop their plans. The other agencies listed will be integral to developing the plans, too.

Under 47-63-6
It is absolutely necessary for water utilities to know immediately of any confirmed releases. So many of the problems coming from the Elk River spill were caused by a lack of communication and knowledge of what actually had polluted the water supplies.

47CSR64 - Financial Responsibilities
We heartily agree that bonding must be sufficient to take care of any disaster. The public should not have to pay for chemical disasters.
We also believe the idea of re-evaluating the adequacy of fees would help in the future monitoring and enforcement of the law. We believe the suggested evaluation program would be a good vehicle for ensuring that staff numbers and salaries are adequate.

Thank you for making the comments' process so accessible.

Nancy Novak, President
League of Women Voters of WV
23 Valley View Circle
Vienna, WV 26105

Helen Gibbins, Director
League of Women Voters of WV
6128 Gideon Rd.
Huntington, WV 25705

STEPTOE & JOHNSON PLLC
ATTORNEYS AT LAW

Chase Tower, Eighth Floor
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000 (304) 353-8180 Fax
www.steptoe-johnson.com

Writer's Contact Information
Richard.Lewis@steptoe-johnson.com
304.353.8133

July 30, 2015

VIA ELECTRONIC MAIL & HAND DELIVERY

West Virginia Department of Environmental Protection
Aboveground Storage Tank Rule Comments
Attn: Joseph Sizemore
601 57th Street East
Charleston, West Virginia 25304

Re: Comments on Proposed Rules *47 CSR 63*, *47 CSR 64* and *47 CSR 65*
Submitted on behalf of M&G Chemicals (aka M&G Polymers)

Dear Director:

This letter provides the comments of M&G Chemicals (aka M&G Polymers USA, LLC) ("M&G" or the "Company") to Proposed Rules 47 CSR 63, 47 CSR 64 and 47 CSR 65 ("Draft Rules" "Proposed Rules" or "Rules") issued by the West Virginia Department of Environmental Protection ("WVDEP" or "Agency") on June 25, 2015. These comments are submitted within the designated comment period, which ends on July 30, 2015.

As an initial matter, M&G endorses the comments submitted by the West Virginia Manufacturer's Association ("WVMA") and incorporates the WVMA comments herein. In addition to those comments and concerns set forth by the WVMA, the Company wishes to provide the following comments and suggested amendments to the Draft Rules:

§ 47-63-1.5.c.: Nonoperational Tanks

This provision excludes non-operational tanks from Sections 5 (Operation & Maintenance), 8 (AST Design, Construction, Leak Detection, and Secondary Containment), 9 (Corrosion and Deterioration Prevention), and 10 (Release Prevention, Leak Detection, and Secondary Containment) of the Rules. M&G asserts that non-operational tanks should be excluded from ALL of the Rules. It makes little sense for a tank or tank system to be subject to any of the rules if it is not in use.

"Nonoperational storage tank" is defined in the Act as "an empty aboveground storage tank in which fluids will not be deposited or from which fluids will not be dispensed on or after the effective date of this article." *See* § 22-30-3(4). Requiring such a tank to be registered with the state and subject to fees does nothing to advance the purpose of the AST Act and Rules. By definition, it is

impossible for "nonoperational storage tanks" to pose a risk to waters of the state and/or human health. Making nonoperational tanks subject to any aspects of the rules amounts to little more than an administrative burden for both the WVDEP and the regulated community.

§ 47-63-3.5: Notification of closure

M&G asserts that the 30-day notice requirement prior to the permanent closure of a tank is unnecessary and does not advance the purpose of the Act. This requirement could interfere with operations and does not accomplish anything that a post-closure inspection could not. M&G urges WVDEP to remove this requirement, or in the alternative require that notice be sent to the WVDEP within 90 days AFTER a tank has been permanently closed.

§ 47-63-5.2.a.: Inspection Requirements

It appears that the initial fit for service inspections that were conducted pursuant to the 2014 interim AST rules will satisfy the requirements of Section 5.2.a. These inspections were costly for many members of the regulated community. As such, M&G requests clarification from WVDEP in response to these comments that inspections conducted pursuant to the interim rules will satisfy the requirements of Section 5.2.a.

§ 47-63-5.5: Spill Prevention Response Plans

Section 5.5.b.1.A. provides that an owner or operator may certify that an AST is subject to a groundwater protection plan (GPP) approved by the Secretary in lieu of submitting a Spill Prevention Response Plain. M&G requests clarification as to the process and procedure for making such a certification and the factors, timing and form of an Agency approval or denial of the GPP certification.

§ 47-65-4.4: Notice

This section provides a responsible party with only ten (10) days after the receipt of a draft consent decree from the Agency to elect whether or not to participate in the administrative process. The timeframe for a response to a proposed consent decree should be extended to at least thirty (30) days. Parties need sufficient time to review and analyze any proposed findings of fact and alleged violations. This process may include interviews with company personnel, collection and review of documents, and consultation with counsel or technical experts. Parties need more time to determine whether or not they wish to participate in the administrative process.

§ 47-65-6.3: Multi-day penalties

As currently written, section 6.3 requires that a "calculation must be made" for each day of violation in the case of an ongoing or continuing violation. All other aspects of the penalty calculations in the proposed rule provide the Secretary with a great deal of discretion. This section should be no different and it is appropriate for the Secretary to determine, on a case-by-case basis, how a proposed penalty should be calculated. M&G urges the WVDEP to amend this section so that the Secretary **may**, but does not have to, calculate a penalty based on each day of violation.

M&G Chemicals appreciates the opportunity to provide these comments and hopes that they will be given careful consideration along with all other comments submitted by the regulated community. If you would like any additional information or further explanation, please do not hesitate to contact me.

Yours truly,

Richard L. Lewis
Counsel for M&G Chemicals

Sizemore, Joe M

From: Janet Keating <janet.ovec@gmail.com>
Sent: Thursday, July 30, 2015 12:43 PM
To: DEP Comments
Subject: Above Ground Storage Tank rules comments
Attachments: Comment.DEP.ASTRules.2015.pdf

Thank you for the opportunity to comment. Please see the attached document.

Kind regards,

Janet

--
Janet Keating, Executive Director
Ohio Valley Environmental Coalition
P.O. Box 6753
Huntington, WV 25773-6753
304.522.0246 phone
304.522.4079 fax

www.ohvec.org
www.sludgesafety.org
www.wvoter-owned.org

"Your spirit is your true shield." Morihei Ueshiba, founder of Aikido; quote from *The Art of Peace*

"Someday after we have mastered the winds, the waves, the tides, and gravity, we shall harness... the energies of love. Then for the second time in the history of the world, man will have discovered fire." -- Pierre Teilhard de Chardin

"Never let a good crisis go to waste."--Winston Churchill

Ohio Valley Environmental Coalition

Supporting Organized Voices and Empowered Communities Since 1957

P.O. Box6753
Huntington, WV 25773-6753

www.ohvec.org

Ph. 304-522-0246
Fax 304-522-4079

30 July 2015

Mr. Scott Mandirola, Division Director
WV Department of Environmental Protection
Division of Water and Waste Management
601 57th Street, S.E.
Charleston, WV 25304

Re: 47 CSR 63: Aboveground Storage Tanks

Dear Mr. Mandirola:

Thank you for the opportunity for the Ohio Valley Environmental Coalition (OVEC) to comment on the rules that govern above ground storage tanks in West Virginia.

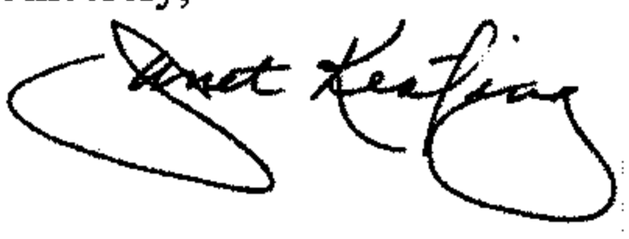
OVEC knows that statewide, our members want laws that provide strong protection for water, our most precious and life-sustaining natural resource, which includes strong rules that govern above ground storage tanks.

We also know from the devastating January 9, 2014, water crisis which led to the passage of the above ground storage tank law,that our economy depends on the clean, uninterrupted flow of water. To that end and in relation to the proposed rules, we ask that WVDEP via your division:

1. Not weaken standards for tanks or relax timelines for enforcement;
2. Provide an opportunity for public notice and comment on amendments to permits and plans before a tank is excused from the Act's requirements;
3. Establish registration fees that adequately fund and staff the program; and
4. Increase bond amounts so that they cover potential liability of a tank failure.

Please keep OVEC informed about any future developments regarding this important issue.

Sincerely,



Janet Keating, Executive Director
janet@ohvec.org

Petcon, Inc.
P.O. Box 6225
Jackson, MS 39288
601-939-7311

July 17, 2015

Comments on Proposed West Virginia Aboveground Storage Tank Rules.

47-63-2 Definitions

Add the following definitions:

Level 1
Level 2
First point of isolation
Site specific permit plan
Weakening equipment

"Release prevention barrier" means a **barrier**
Replace the word barricade with barrier.

4.3 (Siting) Requirements for New Regulated ASTs.
Replace siting with **"location"**

47-63-5 Operation and Maintenance Requirements

5.1. a. Secondary Containment Structure Inspections.

Recommend changing the Level 1 visual inspections from once every 7 day to once every 30 days and may performed at the time of the monthly check.

5.1. a.3 Change the wording to read the following:

Any water accumulation within the secondary containment results in the capacity of the containment being reduced. Any accumulated water in excess of 1 inch or more shall be removed and disposed of in accordance with applicable State and Federal requirements.

5.1. b.4 Explain how to check the overfill equipment monthly.

Annually you would remove the positive shut off valve and inspect it and test sensors, if applicable.

5.1. b.6.C What is "**weakening equipment**"?

5.2 Inspection Requirements

5.2. a Change 180 days to one year.

5.2. a.1 A qualified professional engineer as determined by the State Board of Registration for Professional Engineers .

add; and documents his qualifications to inspect aboveground storage tanks by job experience, training , education or other means approved by the Secretary.

There is no P.E. discipline for inspecting aboveground storage tanks. Simply having a P.E. is not a qualification to inspect aboveground storage tanks.

5.2. b .4 **add:** the certification form shall be kept on-site.

5.2. c. 4 Results of a leak test, **ultrasonic test**, internal inspection……

Add ultrasonic test.

Insert between 5.3.b.1 and 5.3.b.1.A

5.3. b.2 The following tanks A-E are not required to have an internal inspection.

5.5 Spill Prevention Response Plan

Who is qualified to prepare a Spill Prevention Response Plan?

6.2.b.3 Weakening of regulated AST system equipment….

Define "weakening"

8.2.a **add:** owner must have documentation in the form of:a label on the tank, certificate from the manufacturer, documentation on or attached to an invoice describing the tank's construction or any other method accepted by the Secretary.

8.2.c **add:** such testing must be documented by the tester and retained by the owner.

Insert between 8.2.c and 8.2.c.1

If testing is done with a vacuum on the interstice of a double wall or double bottom aboveground tank, the vacuum must remain on the tank until it is set in place where it is to be permanently installed .The vacuum must remain above the minimum level set by the tank manufacturer.

8.2.d.1 **add:** Double wall and double bottom tanks may be tested using a vacuum method.

8.3 Must be upgraded by what time frame?

8.3.a. All existing regulated ASTs storing **Class I or Class II** flammable.... By what time period?

8.3.b-e. By what time period?

8.6 **add last sentence** and appropriate industry standards **and fire codes.**

8.6.e Regulated ASTs storing **Class I and Class II** flammable liquids, combustible liquids or other liquids required by industry standards, **fire codes**, or the manufacturer to have normal or emergency vents

Add the above.

8.6.e.2 Regulated ASTs shall be equipped with emergency vents, **where required by fire codes or industry standards** to ensure that safe pressure for the tanks is not exceeded.

NFPA 30 does not require emergency vents on Class IIIB combustible liquids for tanks with a capacity exceeding 12,000 gals.

8.6.e.5 Last sentence. Weak roof-to-shell tank designs are not allowed for new **shop fabricated** ASTs because they are prohibited under UL 142 **and NFPA 30**

8.7.f All fill pipes leading to a pump filled regulated AST shall be equipped with a properly functioning check valve or equivalent device **and a manually operated valve** that provides automatic...

8.7.g. Last sentence. The valve shall be located on a nozzle welded to the shell of the AST.

What is a nozzle welded to the shell of an AST?

8.7.i. Regulated aboveground piping shall be tested in accordance with requirements of API 570.

Delete this section

Any leak in aboveground piping can be visibly observed.

9.3.g. the criteria for determining the effectiveness of cathodic protection for **galvanic systems** shall be a negative potential of at least **minus** 850 millivolts with the cathodic protection current applied. Alternatively, **a negative potential of at least (minus) 850 millivolts from the instant off reading or** a 100 millivolt shift from the instant off **reading** is acceptable for impressed current systems.

10.1.a. This does not allow for absent tee deliveries. The owner or operator should only be required to monitor the deliveries if there is no mechanical means to prevent overfilling.

10.1.f. **Delete**: **Prior to receiving deliveries. Begin** The owner or operator shall ensure that the fill valves have the proper product identification clearly visible to the delivering transfer operator.

10.1.g. If the owner or operator is receiving an absent tee delivery and is relying on mechanical means to prevent overfilling, the owner cannot take immediate action to stop the flow of the substance being transferred.

10.2.d. Change Level 1 ASTs from 7 to 30 days for a visual secondary containment inspection.

10.3.g. ...regulated AST system, shall be equipped with interstitial monitoring equipment capable of detecting a discharge of a substance into the interstitial space under all operating conditions, **or manually monitored,** and the interstitial space shall be monitored once every calendar month.

11.4.d. Closure activities must be **certified by** a professional engineer, a person certified by API or STI or.....

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

July 30, 2015

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

Dear Director Mandirola:

Pursuant to the public 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 draft rules to implement the provisions of Senate Bill (SB 423).

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 safe, environmentally-responsible, efficient 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. WVCA appreciates the opportunity to offer comments and suggestions on the proposed tank rules.

Introduction

WVCA appreciates the efforts of the agency to draft a new set of administrative rules to implement the state's Aboveground Storage Tank (AST) Act as revised by the Legislature in SB 423. However, as we detail in the comments that follow, we believe the agency, in these proposed rules, continues to design an overly prescriptive regulatory program that will impose agency control over virtually every aspect of an AST's design, maintenance and operation. Since many of the precise details and requirements of the current proposed rules appear not to have changed much from the rule proposed by the agency to implement the original AST Act (SB 373), we have provided as attachments the comments previously filed by WVCA on those proposals and we ask the agency to consider them in the current rulemaking.

General Comments

Tanks at Coal Mining Operations

Unlike the tank facility that served as the catalyst for the AST Act and subsequent rules, tanks at coal mining operations are subject to regulation and inspection per the requirements of the West Virginia Groundwater Protection Act (GPA), W.Va. Code Chapter 22-22-1 *et.seq*. and the Groundwater Protection Rules for Coal Mining Operations, 38 CSR 2F.

As we have noted in our previous comments regarding earlier rulemaking efforts related to ASTs, the existing regulatory structure for mining operations is unique as coal mines are also subject to mandated inspections by Division of Mining & Reclamation (DMR) inspectors who also enforce the provisions of the GPA and the Groundwater Protection Rules for Coal Mining Operations at a frequency required by the West Virginia Surface Coal Mining & Reclamation Act. The GPA, the Groundwater Protection Rules for Coal Mining and the DMR inspections to implement those existing programs have proven effective for regulating tanks located at coal mining operations and we ask the agency to be mindful of this extensive existing regulatory structure as it moves to implement the provisions of SB 423.

<u>Mobile Tanks</u>

The current proposal maintains a definition for "mobile tanks" from the original proposed rule that excludes ASTs located on "saddles, legs, stilts, rack or cradle." Many tanks located on coal mining sites are on "saddles" or "skids" due to the rugged nature of the site. This is especially true in development areas where vegetation is being cleared, initial cuts are being taken and topsoil removed, as the area is being prepared for surface mining or the development (face-up) of an underground mine. These tanks are moved frequently and follow the progression of the development work, mining activities and reclamation of the site. Similar tanks likely exist in other industries such as construction, oil & gas drilling, farming and forestry. For all practical purposes, they are mobile tanks and should be treated as such per the statute.

Process Vessels

As we noted in previous comments on earlier versions of the agency's proposed AST rules, some tanks used at coal mining operations are specifically designed to release substances into waters of the state. These tanks are routinely used to provide water treatment at mining facilities to maintain compliance with NPDES effluent limits.

Since there is a "steady, variable, recurring or intermittent flow" of materials as referenced in SB 423, we believe the agency should classify these tanks as "process vessels." WVCA believes that a specific clarification of this definition is warranted given the confusion that has already been experienced by the industry under SB 373 and previous versions of the proposed tank rule.

Agency Control of ASTs and Facilities by Virtue of the Proposed Rule

The proposed rule creates a tangled and confusing web of submissions for virtually every aspect of AST installation, use and maintenance, arguably extending the agency's authority and control over an entire operation or facility simply because an AST is present. This even extends to the potential sale of a facility where WV DEP must be notified 30 days before the transaction. The rule also contains specific mandates regarding the design and siting of a tank facility, essentially giving the agency "start to finish" control over an industrial facility.

Coupled with the multiple notification / approval requirements, the excessively detailed mandates regarding design and construction of tanks have removed any discretion available to the operator and potentially required under other regulatory

programs such as the GPA and/or federal Spill Prevention Control & Countermeasures regulations.

While the revisions to the AST Act by the Legislature dramatically improved the scope of the tank regulation, the rules proposed by the agency maintain an unreasonable level of prescriptive mandates. This level of agency control is unparalleled in similar regulatory programs and will frustrate, not facilitate environmental protection. Much like the earlier versions of the rule, the proposed rule eliminates operational and professional discretion, and was apparently drafted without regard to the existing programs that already regulate ASTs at coal mining operations.

To achieve a more balanced regulatory structure the agency should consider eliminating many of the agency approval and notification requirements with specific focus on the items that must be certified by RPEs.

Specific Rule Provision Comments

In the section below, WVCA offers observations relative to particular sections of the rule and attempts to avoid duplicating similar remarks made in the preceding general comments section of this submittal. Given the complex nature of the proposal, we offer the following limited comments on specific portions of the rule.

1.6.m After providing a list of "industry standards" in section 1.6.a, the agency states that the rule ultimately overrules the referenced standards. As noted previously, the proposed rule is extremely inflexible and will likely supersede and contradict the referenced standards and

accepted engineering practices. Reliance on the referenced AST standards should be the focus of the proposed rule instead of merely referencing them and then proceeding to displace them with agency written rules.

3.1.a In a compartmented or segmented tank structure, if a single compartment or segment of a larger tank meets the definition of a "tank," the contents of the individual compartments or segments of the tank should not be aggregated in the determination of whether they meet the established AST threshold of 1,320 gallons. They should each be considered individual tanks.

3.1.b Like compartmentalized tank structures, as referenced in 3.1.a , each of the compartments in a manifolded tank structure should be treated as an individual tank rather than aggregated to determine whether the structure meets the established AST threshold of 1,320 gallons.

3.1.f. This section requires a revised registration form based on "any change in the corporate or business structure" of the AST owner. This section requires further clarification to be manageable. Does a change in management constitute a revision that requires amended registration or a more substantial change such as subsidiary ownership?

3.4 Given that new tanks have to be registered with the WV DEP before they can be used, and tanks that are moved must be re-registered within 30 days, there is no reason for the requirement of a separate notification 30 days before installation. If the DEP wants to complete an inspection, they have the 30 day window after installation to perform the task.

3.6. The proposed rule makes it very difficult to change ownership of ASTs currently in operation. For example, the prior owner cannot operate a tank unless it is registered in its name, while the new owner cannot operate them until they are re-registered.

It is our belief that the WV DEP should allow for the continued operations of tanks that are changing ownership, by providing 30 days to change the registration while providing that the obligations to comply with the Act follow actual possession of the tank.

4.3.a and 8.3.a There is no reason to incorporate state and local fire codes into the AST rules. The codes are already sufficiently enforceable by the appropriate authorities.

4.3.b Given that some smaller tanks are manufactured to include their own secondary containment system, we urge the WV DEP to mandate the requirement for unobstructed views within the container necessary to determine leakage without specifying

distance.

5.6.b According to the statute as passed by the Legislature, signs are to be "clearly visible and legible from a public roadway, public right-of-way or from outside the containment area." We believe the WV DEP should set the criteria for the content of the signs and not specify the lines of sight of the signage.

7.1 It is our belief that the requirements of Sections 6 and 7 of the proposed rule, which deal with releases and corrective action, are confusing with regard to "threatened releases" and as such create more problems than they solve.

The principal example of this confusing language is Section 7.1 which establishes mandatory requirements to be undertaken "in response to any confirmed release or threatened release." We believe, given the existence of the requirements established under Section 6 of the proposed rule, that the term "threatened release" should be deleted to provide clarity.

8.2.f The WV DEP, quite simply, goes beyond the scope of its authority with this requirement. The agency does not have the authority, real or implied, to require tank owners get approval before they put tanks in place. The agency can establish standards for registration and operation once those tanks are in place, but it does not have

the right to veto the siting of a tank.

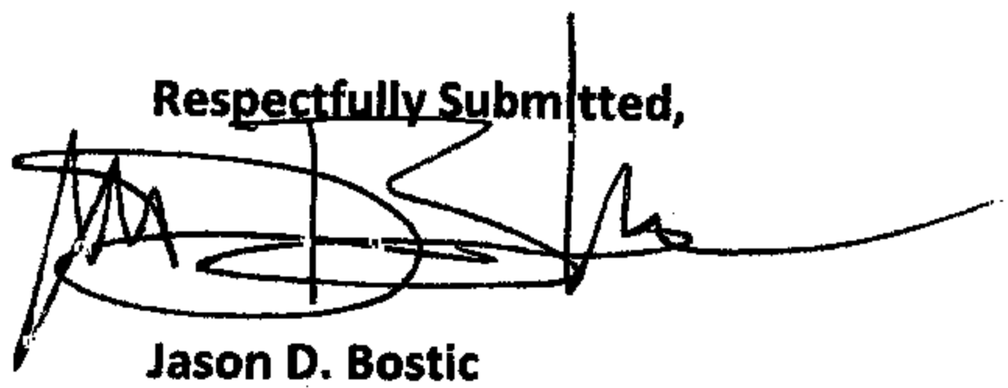
12.1 WV DEP does not have the authority, real or implied, to prohibit the transfer of fluids into an AST without proof of registration or payment of fees. The responsibility for meeting registration and payment of fees requirements lies with the tank owner and not the person or company delivering the product to the site. If an unregistered tank is being used, the tank owner is already subject to fines and/or prosecution.

12.2.c WV DEP should not and does not have the authority under the statute, to attach a locking device on an AST to prevent receipt of product **UNLESS** it is doing so as a result of a court order or injunction. Doing so potentially exposes site personnel to significant danger by preventing needed maintenance and oversight of processes that might be taking place within the tank.

Conclusion

WVCA appreciates the opportunity to offer comments on the draft rule. We hope the comments demonstrate the proposed rule is inflexible and overly detailed and fails to acknowledge routine situations encountered on mining and reclamation operations by frustrating the administration of regulatory programs specific to the coal industry.

Respectfully Submitted,



Jason D. Bostic
Vice-President

Cc: **Harold D. Ward**
Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

Lewis A. Halstead
Deputy Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

West Virginia Coal Association

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

October 24, 2014

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

Dear Director Mandirola:

Pursuant to the public notice published on September 18, 2014 by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the draft emergency rule 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 safe, environmentally-responsible, efficient 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. WVCA appreciates the opportunity to offer comments and suggestions on the proposed emergency rule.

Introduction

WVCA appreciates the efforts of the agency to draft a new set of administrative rules in the short time frames imposed by SB 373. However, we believe the prescriptive and potentially conflicting requirements of the proposed rule reveal what we believe is a fundamental flaw to the approach taken by the agency to address the situation created by the January 2014 chemical spill on the Elk River.

Instead of crafting rules and regulations to apply new standards to every single tank in the state regardless of its previous level of regulatory evaluation, permitting, inspection and enforcement by WV DEP, a "regulatory program analysis" should have been undertaken to determine why a permitted and inspected facility, subject to the West Virginia Groundwater Protection Act (GPA), its corresponding legislative rules and other state-implemented environmental regulations was allowed to deteriorate to the point where the chemical spill and resulting impact to a major water supply occurred. To date, WVCA is aware of NO review or analysis undertaken by the Legislature or the agency to determine where the existing programs (or their proper implementation) were lacking relative to the adequate regulation of the Freedom Industries site. Such a review would allow for the *revision* of existing statutes and rules like the GPA to address the specific concerns related to drinking water contamination.

Such a comprehensive review would be well informed and relatively straightforward to accomplish now that the tank registration process has been completed. Under the requirements of SB 373, the registration process gathered information for every tank in the state, including "if the inventoried tank is regulated under any existing state or federal regulatory program...the identifying number of any license, registration or permit issued for the tank, and identify the regulatory standards and requirements the tank is required to meet."[1] The statute also requires WV DEP to determine the level of "minimum design, construction, inspection, secondary containment, leak reporting and performance standards established under an existing license or permit."[2]

Properly compiled by WV DEP as required by the statute, the Legislature and agency can determine which tanks are adequately regulated by existing state and federal regulatory programs and those for which additional scrutiny is needed. The information provided by the registration process also identified tanks that are located within a Zone of Critical Concern (ZCC) for a public water supply. As we note in subsequent comments, the primary concern of WV DEP should be on tanks located within those ZCCs that actually present a potential risk to public water intakes.

Together, the "regulatory review" and information collected by the tank registration process would allow a more precise regulatory program to be crafted that specifically addresses the shortcoming of existing statutes, rules, regulations and

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[1] W.Va. Code §22-30-4(c).
[2] W.Va. Code §22-30-4(e).

policies while focusing on "under-regulated" tanks that actually pose a potential threat to public water intakes. Instead of developing a completely new regulatory program and associated administrative bureaucracy for every tank in the state, WVCA believes a more specific, ZCC-focused program, that would revise the *existing* regulatory structure and authority of WV DEP would more quickly and adequately address the primary concern of the Legislature to protect water supplies. This revised program would also avoid an overriding concern of regulated industry that creation of this totally new program will lead to substantial conflict and confusion with existing requirements, standards and agency authority. As both the agency and industry struggle to untangle the considerable conflicts that will be created by the new program at every single tank in the state, attention will be diverted from ASTs located within ZCCs that are possibly under-regulated and thereby present the greatest risk to water intakes.

As noted in our previously-filed comments on the draft interpretive rule, 47 CSR 62, (see attached) WVCA believes the focus of the proposed rule should be on tanks located within a ZCC for a public water supply or Level One tanks as classified by the interpretive rule. As we detail in subsequent comments, applying the restrictive mandates of this new program to all tanks in the state will bury the agency and regulated industry in repetitive paperwork and divert attention from ASTs that actually pose a potential threat to a drinking water supply. Irrespective of its contents, a tank presents little risk to a water intake if it is far removed from a ZCC. Additionally, for coal mining operations, all tanks, regardless of their location, will continue to be regulated by

the West Virginia GPA[3], its accompanying Groundwater Protection Rules for Coal Mining Operations (38 CSR 2F) and/or federal Spill Prevention Control and Countermeasures Regulations (SPCC).[4]

WVCA also has serious concerns with the substantive portions of the rule, including (detailed in the comments that follow):

1. Contrary to the instructions of the West Virginia Legislature, WV DEP has ignored the existence of existing programs and specific regulatory divisions within the Department by refusing to waive certain permitting requirements for ASTs that are adequately regulated such as tanks located at coal mining operations;

2. WV DEP has selectively interpreted the statute to dramatically expand the universe of tanks subject to regulation under SB 373 counter to the intent of the West Virginia Legislature;

3. Contrary to the statute, the agency has irrationally expanded the definition of ASTs to include tanks located in underground coal mines;

4. The agency has expanded the definition of "tank" after completion of the registration process, causing tanks excluded by the Legislature in the plain wording of the statute to now be subject to regulation;

5. WV DEP has expanded the meaning of "reportable release" beyond that contained in SB 373;

6. The new AST program proposed in these rules is "process heavy" and seems more focused on the bureaucratic exchange of paperwork than actual environmental protection measures;

7. Under the "process heavy" proposed rule, WV DEP will wield control over virtually every aspect of a facility's operation, maintenance and even ownership simply because an AST is located on-site. For example, the phrases "submitted to the Department", "approved by the Department" and "approved by the Secretary" appear about 34 times in the proposed rules;

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[3] *See generally* W.Va. Code §22-12-1 *et. seq.*

[4] *See generally* 40 CFR 11 *et. seq.*

8. WV DEP has grafted the standards and requirements of the underground storage tank regulatory program into the new AST rules without consideration of the suitability or practicality of applying standards for tanks that cannot be seen to those that can be easily viewed above ground;

9. The agency has transformed a simple provision contained in SB 373 requiring demonstration of "adequate financial resources" into a complicated mini-regulation of its very own;

General Comments

Regulation of ASTs at Coal Mining Operations

A review of the proposed rules quickly reveals the agency drafted the proposal in a "regulatory vacuum" with apparently no consideration of existing programs and requirements. Specific to coal mining, these would include the West Virginia Groundwater Protection Act (WV GPA), the Groundwater Protection Rules for Coal Mining Operations (38 CSR 2F), the Groundwater Protection Fee Rule (47 CSR 55) and the comprehensive inspection and enforcement staff and programs maintained under WV DEP's Division of Mining & Reclamation (DMR). By ignoring these existing programs, the proposed rule has created duplicative and sometimes conflicting requirements that will have no practical benefit beyond creating an endless "paper exchange" between regulated industries and the agency, establishing an entirely new record keeping, permitting and inspection division of the agency and further complicating an already intricate regulatory program for coal mining operations.

WVCA maintains that regulation of ASTs at coal mining operations is adequately addressed by the existing and overlapping state and federal rules and regulations. Historically, the monitoring and inspection of ASTs at coal mining facilities has been addressed through the implementation of the GPA and its accompanying legislative rules specific to coal mining operations. In addition to the GPA, tanks containing petroleum-based substances are also subject to the requirements of the federal SPCC regulations.

Many of the key requirements of SB 373 are similar to the existing requirements under the Groundwater Protection Rules for Coal Mining Operations. For example, 38 CSR 2F requires the development of Groundwater Protection Plans (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 2F.3.3.1.d). For tanks containing petroleum-based substances, federal SPCC requirements would also apply.

The effectiveness of the existing regulatory programs was demonstrated in the days following the Elk River chemical spill when DMR completed GPA inspections at 93 coal preparation plants. Ninety-seven percent of these operations were in full compliance with the GPA and its implementing rules.[5]

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

To implement the mature regulatory programs established under the GPA, West Virginia maintains a highly-specialized inspector force within DMR dedicated entirely to the regulation and inspection of coal mining operations and each mining operation is required to be inspected at a given frequency.[6] According to federal oversight records, DMR conducted more than 25,000 complete and partial inspections at coal mining operations last year.[7] These inspections are in addition to other regulatory agencies that routinely inspect coal mining operations and have some level of regulatory responsibility for tanks at mining sites including the West Virginia Office of Coal Miners' Health, Safety & Training (OMHS&T) and the federal Mine Safety & Health Administration (MSHA).

While the West Virginia Surface Coal Mining & Reclamation Act mandates the inspection frequency, DMR inspectors are authorized by statute to enforce other state environmental programs including the 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).[8]

The agency's willingness to ignore the existence of this extensive regulatory structure for tanks located at coal mining facilities we believe will lead to a confused, conflicted and overlapped tank program. For example, despite the agency's efforts to act as though it does not exist, the GPA and the coal mining-specific groundwater protection rules will continue to apply at all mining sites. The scope of tanks and

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[6] See generally W.Va. Code 22-3-15 *et. seq.* and 38 CSR 2.20.1 *et. seq.*
[7] "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/
[8] *See generally* "Groundwater Training for DMR Inspectors." West Virginia Department of Environmental Protection, Division of Mining & Reclamation, 1996.

materials regulated by the GPA is far more inclusive than those regulated by SB 373 and these proposed regulations. The GPA regulates all operations and activities that "may be reasonably expected to contaminate groundwater"[9], not just substances based on a tank capacity figure. The federal SPCC program also regulates some of the same tanks, depending on contents (petroleum-based) and capacity. DMR's special training and 20 years of experience implementing and enforcing the GPA has led to minimal duplication / confusion with the SPCC program. SB 373 and these proposed rules, as drafted, will regulate the very same tanks. So, depending on its contents and size, a tank on a mining operation could be subject to three different standards, including inspection and enforcement requirements under three separate programs.

Since WV DEP has chosen to ignore existing divisions and inspection structures like that of DMR, a mining facility will be subject to multiple inspections under multiple programs for the same tank. A DMR inspector will fulfill the obligations imposed under the GPA and its accompanying rules only to have an inspector from the new "tank division" review the very same tank for compliance with SB 373 and these rules.

Given the complex and restrictive nature of these proposed rules (tanks cannot be constructed / placed below power lines, above utility lines, etc.), there will undoubtedly be conflicts between the two programs. Since regulated entities do not have the same luxury of "selective regulatory acknowledgement" as WV DEP, compliance with all the aforementioned programs will be required, placing the mining

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[9] *See generally* W.Va. Code §22-12-1 *et. seq.* and 38 CSR 2F *et. seq.*

company in an impractical situation of trying to satisfy two regulatory "masters", both of which possess substantial enforcement power.

The issue of overlapping and confused regulation of tanks was discussed and debated by the Legislature during its consideration of SB 373. The Legislature recognized that certain industries and facilities may be adequately regulated under existing programs and authorized WV DEP, *in rulemaking*, to waive certain provisions of the statute based on a finding that existing regulations require secondary containment, spill prevention plans, regular inspections and emergency notification and response. As our previous comments demonstrate and a review of the GPA, the Groundwater Protection Rules for Coal Mining, the federal SPCC requirements and the mandated inspection frequency for mining facilities confirm, coal mining operations qualify for the exemption at W.Va. Code Chapter 22-30-25(b). That WV DEP has chosen not to exempt ANY regulated facility or entity, and to some extent has used the rulemaking process to *"nullify"* specific exemptions placed in the statute by the Legislature, demonstrates the degree to which the agency has failed to acknowledge the existence of the other regulatory programs and even other divisions, their inspectors and technical staff, within its own department. By doing so, the agency has guaranteed the very duplication and confusion the Legislature sought to avoid and, given the complexities of the rule (see subsequent comments), created a new and large division within the Department.

The agency's failure to consider the requirements of other environmental programs or to even consult with other divisions when developing this proposed rule,

has also created serious gaps and inconsistencies specific to ASTs used in the coal mining industry. For example, as written the rule prohibits the release of substances from a tank by classifying any discharge as a "confirmed release" that is immediately reportable to the agency.[10] Some tanks used at coal mining operations are specifically designed to release substances into waters of the state. These tanks are routinely used to provide water treatment at mining facilities to maintain compliance with NPDES effluent limits. Under the proposed rule, every drip or dose of treatment agent that is required to maintain compliance with one program administered by WV DEP will cause a "reportable release" under another program and division within the agency.

A similar inconsistency is found at section 7.5.c.16.i, which references "worker safety and health in accordance with OSHA requirements..." The WV OMHS&T and MSHA have health and safety jurisdiction at coal mining operations, not OSHA. Simple consultation with DMR and/or exempting ASTs at coal mining operations would have avoided the impractical conflicts and inconsistencies now created by the draft rule.

The refusal of the agency to use its rulemaking power, as directed by the statute, to exempt regulated ASTs from the new program ignores the information collected by the agency during the registration process. As we noted in our introductory paragraphs, the Legislature specifically required the submission of detailed information regarding existing licenses and permits for tanks, including "minimum design, construction, inspection, secondary containment, leak reporting and performance standards

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[10] Section 2.15 and 6.2 of the proposed emergency rule.

established under an existing license or permit."[11] *Obviously the Legislature intended this information to be used by the agency to determine if certain ASTs were adequately addressed under existing regulatory programs.* If not, there was no reason to collect it in the first place and the statute would explicitly require the new tank program to apply to all facilities without the exemption through rulemaking provision.

Definition of "Tank" and Expansion of the Proposed Regulatory Program

The term "tank" and therefore the universe of facilities and ASTs regulated by the new program is precisely defined in SB 373 at §22-30-3(1) and the proposed rule should consistently reflect that statutory definition. Instead, WV DEP has "reinterpreted" the intent of the Legislature and dramatically expanded the universe of tanks subject to regulation.

The proposed rule has departed from the simple definition of "tank" and its "ancillary aboveground /underground pipes and dispensing systems up to the first point of isolation" per §22-30-3.1 to include all associated piping and dispensing systems. This new expanded definition of "aboveground storage tank system" also includes "spill containment devices, overfill protection devices, secondary containment systems and any associated release detection equipment." Under this definition of "AST system", leak detection devices could be required to have secondary containment and secondary containment could be required to have tertiary containment and leak detection and so on, with the impractical and absurd interpretations being too numerous to list. The same is true for piping and dispensing systems. SB 373 included in the definition of

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[11] W.Va. Code §22-30-4(c).

"tanks" only the "ancillary pipes and dispensing systems *up to the first point of isolation*" (emphasis added).[12] In the proposed rule "AST system" appears to include all piping, potentially extending the regulatory control of the agency to the entire facility. Again, unreasonable interpretations are abundant and too numerous to list. To avoid these situations, WV DEP should revise the rule and return to the definition of AST as contained in the statute.

The proposed rule also expands the regulatory reach of SB 373 in other sections. For example, the rule contains a definition of "manifolded" and "compartmentalized" tanks that requires the capacity of these ASTs to be aggregated in order to determine if they satisfy the threshold for regulation under the statute.[13] This is a new interpretation developed by the agency and one that was specifically rejected by the Legislature during its consideration of SB 373 and the rule should be revised to remove this expansive definition.

The proposed rule contains a similar reinterpretation for "mobile tanks", and now excludes from that definition ASTs located on "saddles, legs, stilts, rack or cradle".[14] In addition to being beyond the scope of the legislation, this definition is further evidence the agency failed to consult with other divisions within WV DEP with expertise and experience regarding particular activities such as mining.

Many tanks located on coal mining sites are on "saddles" or "skids" due to the rugged nature of the site. This is especially true in development areas where vegetation

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[12] W.Va. Code §22-30-3.1
[13] Section 2.13 and 2.41 of the proposed emergency rule.
[14] Section 2.43 of the proposed emergency rule.

is being cleared, initial cuts are being taken and topsoil removed, as the area is being prepared for surface mining or the development (face-up) of an underground mine. These tanks are moved frequently and follow the progression of the development work, mining activities and reclamation of the site. Similar tanks likely exist in other industries such as construction, oil & gas drilling, farming and forestry. For all practical purposes, they are mobile tanks and should be treated as such per the statute.

The proposed rule also excludes from the definition of "mobile tank" ASTs that are otherwise moveable because they are connected to "stationary underground and/or above ground piping."[15] Here again, the agency has ignored the intent of the statute. A "mobile tank" is *moveable*, regardless of whether or not it is temporarily connected to a fixed piping system. This interpretation by the agency would lead to an absurd result where otherwise specifically excluded tanks are "re-regulated" because they are momentarily connected to a fixed system for loading and unloading purposes.

The proposed rule seeks to further "annul" the mobile tank exemption by requiring a tank to be moved outside "a facility where an AST system is located" at least once every 60 days. Here again, there was considerable discussion on this particular issue during the Legislature's consideration of SB 373 and it was clearly understood that a "mobile tank" is *moveable,* and may travel from one place to another within a facility. There is NO requirement that a moveable tank travel offsite before it truly becomes a "mobile tank" in the eyes of SB 373. As long as a moveable tank changes its physical location, even within a facility, it is a mobile tank. Any interpretation otherwise ignores

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[15] Section 2.42 of the draft emergency rule.

the statute and dramatically expands the universe of ASTs subject to these regulations. This new interpretation again demonstrates the lack of consultation and coordination between the authors of the rule and specialized regulatory divisions within WV DEP. With respect to coal mining operations, as DMR would surely confirm, movement of tanks on-site occurs frequently as tanks follow the equipment and progression of the mining and reclamation operations. It is also worth noting that even though they are "mobile" and under the correct interpretation of SB 373 should be exempt from the requirements of this proposed rule, any moveable tanks on coal mining operations are also addressed under the state GPA, its implementing regulations and/or the federal SPCC regulations.

<u>Tanks in Underground Coal Mines</u>

The proposed rule would also include in the definition of AST, tanks located in underground coal mines.[16] This interpretation is clearly beyond the scope intended by the Legislature and is downright nonsensical, defying conventional wisdom.

SB 373 defines a "tank" as an AST "ninety percent capacity of which is *above the surface of the ground*..." (emphasis added).[17] The language of that definition is hard to ignore and we are perplexed as to how WV DEP could take that plain meaning and stretch it to underground coal mines, just because a tank may be located "upon or above the surface of the floor" of an underground mine.[18]

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[16] Section 1.5.e of the proposed emergency rule.
[17] W.Va. Code §22-30-3(1)
[18] Section 1.5.e of the proposed emergency rule.

Beyond the obvious, plain meaning complications associated with including tanks in underground mines in the SB 373 regulatory program, there are practical, implementation issues associated with such an inclusion. Underground coal mines are heavily regulated under state and federal mine safety programs and agencies. MSHA and OMHS&T independently administer comprehensive, detailed regulations that address the storage and use of fluids in underground coal mines and the adequacy of those regulations have never been questioned. These safety programs mandate routine inspections by both the state and federal agencies. *No division of WV DEP has jurisdiction or authority for underground coal mines beyond the surface facilities associated with a given mine.* In fact, for a WV DEP inspector to travel underground, they would be required to complete specialized training and obtain a certification per the requirements of WV OMHS&T and MSHA. For the agency to assume an aboveground storage tank rule (not SB 373 since the language of the statute is clear) now grants WV DEP that authority is preposterous. WV DEP should remove the provision of the rule that purports to extend the new AST program to underground coal mines.

<u>Issuing Revised and Expanded Definitions of AST After Close of the Registration Period</u>

As noted in the previous comments, WV DEP has significantly expanded the scope of tanks that qualify as "ASTs" under SB 373. In many instances doing so in direct conflict with the plain wording of the statute. Because these new definitions are so radically removed from SB 373, the release of the rule was the first time they were

shared with the public and will become effective only when the rule is filed with the Secretary of State and the Legislature. However, ASTs were required to be registered by October 1, 2014. By expanding the universe of tanks included in the AST regulatory program by virtue of this rule, the agency has potentially "created" unregistered tanks. To avoid this "gap" in registration the agency should return to definitions contained in SB 373.

Expanded Definition of Reportable Release

Under SB 373 a "release" is confined to an accidental release of fluids into secondary containment that presents an "immediate threat of contamination" excluding "overfill or spillage of up to twenty gallons of fluid... wholly contained within a containment structure..."[19] The same statutory provision declares that such "spillage or overfill" of up to 20 gallons into secondary containment "shall not be required to be reported." The proposed rule contains confusing references to release reporting and contains sections that do not clearly reflect the language of SB 373, arguably requiring the reporting of any release. For example, the rule's sections on reporting a "confirmed release" and/or a "threatened release" contain language similar to the statute regarding "overfilling or spillage".[20] However, the rule later requires immediate notification to the agency "if any substance other than water is found in the containment area."[21] WV DEP must revise the rule to properly reflect the statutory definition of "release" and remove any conflicting provisions that confuse the application of that term.

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[19] W.Va. Code §22-30-3(12).
[20] Section 6.2.b. of the proposed emergency rule.
[21] Section 5.2.a.4. of the proposed emergency rule.

As we noted in previous comments, the same sections of the rule also prohibit and/or require immediate reporting for discharges from ASTs that designed to release treatment agents to maintain compliance with effluent limits.

Process and Paperwork Focused Regulation

A dominating theme throughout the proposed rule is the submission of paperwork to WV DEP and its subsequent approval by the agency before almost anything related to an AST can be carried out. We are concerned this cycle of submission and approval is impractical and untenable, especially without creating an expansive new "AST division" within WV DEP to sustain the never-ending exchange of information between tank owners and the agency.

For example, the proposed rule requires multiple notifications, within 24 hours or 30 days depending on the circumstances, under the registration section alone. This includes six separate notification requirements ranging from changes in telephone numbers to change in tank status. The registration section also requires 30 days *advance* notification to WV DEP for such things as upgrading, closing or changing tank status or the sale of a facility/operation that contains regulated tanks. Even though they are required to be certified by a RPE, emergency remedial actions to address a potential or actual spill cannot be performed without agency approval. Similar notification requirements exist under the other sections of the rule, with the phrases "submitted to the Department", "approved by the Department" and "approved by the Secretary" appearing about 34 times in total.

WVCA believes this interwoven and confusing system of paperwork submission and approval will frustrate the effective regulation of ASTs as the program degenerates to a "chase the paper" exercise and the attention of industry and the agency is "diffused" from assuring environmental protection to making sure the right notification was filed within the correct time frame for simple, everyday operational issues. This situation will be further exacerbated at facilities that are subject to existing regulation through the state GPA and/or federal SPCC requirements, which contain their own unique notification and reporting obligations.

To ensure an effective program, WVCA urges the agency to consider revisions to the rule that eliminate some of the administrative and paperwork requirements in order to remove impediments to the effective regulation of ASTs. For ASTs located on facilities subject to regulation and enforcement under the state GPA and/or the federal SPCC regulations, this would include exercising the authority granted by the Legislature to exclude those sites from certain requirements under SB 373.

<u>Agency Control of ASTs and Facilities by Virtue of the Proposed Rule</u>

As we noted previously, the proposed rule creates a tangled and confusing web of submissions for virtually every aspect of AST installation, use and maintenance, arguably extending the agency's authority and control over an entire operation or facility simply because an AST is present. This even extends to the potential sale of a facility where WV DEP must be notified 30 days before the transaction. The rule also

contains specific mandates regarding the design and siting of a tank facility such as minimum spacing between tanks and prohibiting tank construction under power lines.

Coupled with the multiple notification / approval requirements, the excessively detailed mandates regarding design and construction of tanks have removed any discretion available to the operator and potentially required under other regulatory programs such as the GPA and/or federal SPCC regulations.

Another concern regarding excessive "agency control" relates to rule's requirements for RPE certification. While mandating RPE certification, the rule then details very specific requirements that may not be supported by professional engineering standards and practices. Further frustrating this situation are multiple instances where RPE submissions must arguably be approved by the agency. Unless the new "tank division" at WV DEP will be well staffed by RPEs, non-engineers will be approving the work of RPEs or the submissions will languish awaiting approval by the limited staff.

This level of agency control is unparalleled in similar regulatory programs and will frustrate, not facilitate environmental protection. To achieve a more balanced regulatory structure the agency should consider eliminating many of the agency approval and notification requirements with specific focus on the items that must be certified by RPEs.

Reliance on Underground Storage Tank Rule in Drafting AST Regulatory Program

WV DEP has readily admitted relying on the underground storage tank (UST) regulatory program as a guide in crafting the new rules required by SB 373. WVCA believes transplanting the UST program into the AST rule is a mistake since the differences between the two types of tanks far outweigh the similarities. The end result is apparent in this proposed rule: an overly prescriptive program that removes operational and professional discretion, drafted without regard to the existing programs that already regulate ASTs at coal mining operations.

The most obvious reason for more detailed requirements for USTs is their location. They are underground and cannot be readily inspected or monitored. As such, very specific standards related to things like siting, construction methods, routine testing and leak detection are warranted since they are designed to compensate for not being able to actually see the tank. This is obviously not true for ASTs, and less proscriptive standards should be considered.

The nature of USTs and their use is also dramatically different than ASTs. USTs are usually used to store fuel and there are typically only a few tanks in service at a given location. The contents of the tanks rarely if ever change between installation and retirement when they are removed. There are far more ASTs in service at a given facility as compared to a site using USTs and ASTs may store a variety of substances in their service life. USTs are small compared to many ASTs used across regulated industry.

USTs are usually pressurized while most ASTs are not. These differences alone warrant the development of "AST only" regulations and standards.

We also believe the development of stand-alone AST regulations is consistent with legislative intent. During its consideration of SB 373, the Legislature could have simply mandated the agency to develop an AST program that mirrored the requirements of the UST regulations but it chose to craft an entirely new statute that is substantially different than the UST program, including the ability to exempt certain tanks from the AST rule if appropriately regulated under other programs. WV DEP should do the same and seek to follow the intent of the AST statute as much as possible instead of converting the UST program to cover ASTs.

Financial Assurances

SB 373 requires tank owners to "provide evidence of adequate financial resources to undertake reasonable corrective action..."[22] Included in the provisions of the statute are allowable demonstrations of "adequate resources" including "evidence of current insurance" and "proof of assets."[23] The proposed rule moves beyond these statutory considerations and establishes a new bonding matrix that requires bonds and guarantees based on tank capacity, adding further complication to an already intricate proposed rule.

WVCA believes the detail contained in the bonding section is unsupported by the statute and is overly comprehensive for tanks that are not located within a ZCC or those

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[22] W.Va. Code §22-30-8(a).
[23] W.Va. Code §22-30-8(a).

regulated under other environmental programs. This would include tanks located at coal mining operations, which are subject to state GPA and/or federal SPCC requirements and maintain bonds and financial assurances under WV SCMRA.

Specific Rule Provision Comments

In the section below, WVCA offers observations relative to particular sections of the rule and attempts to avoid duplicating similar remarks made in the preceding general comments section of this submittal. Given the complex nature of the proposed rule, we offer the following limited comments on specific portions of the rule.

1.6.m After providing a list of "industry standards" in section 1.6.a, the agency states that the rule ultimately overrules the referenced standards. As noted previously, the proposed rule is extremely inflexible and will likely supersede and contradict the referenced standards and accepted engineering practices. WVCA believes this provides another example of the regulatory problems that result from reliance on the UST program to draft AST rules. Reliance on the referenced AST standards should be the focus of the proposed rule instead of merely referencing them and then proceeding to displace them with rules transposed from the UST program.

2.12 Defines "change in service" for an AST to include a "change in nature of contents" and would trigger additional notification to the agency. This provision is draconian and would require additional paperwork exchange for the agency just because the specific mixtures of tank are adjusted. This occurs often in mining industry, where blends of water treatment chemicals and even fuel mixtures are adjusted based on season and temperature.

3.1 Requires all ASTs or AST systems to be registered "regardless of its operational status." WVCA questions the need to register tanks that are merely sitting in a warehouse awaiting delivery to the end customer or installation at a facility. Additionally, this section appears to conflict with 3.1.c. which requires registration "prior to being placed into active service. The agency should revise the proposed rule to reconcile the two sections and require registration only before a tank enters "active service."

3.1.f. This section requires a revised registration form based on "any change in the corporate or business structure" of the AST owner. This section requires further clarification to be manageable. Does a change in management constitute a revision that requires amended registration or a more substantial change such as subsidiary ownership?

4.2 This section of the rule is remarkably detailed, containing requirements as to minimum spacing between tanks (three feet) and prohibiting tank placement below overhead power lines or above underground utilities. To our knowledge, none of the other state or federal regulatory programs that apply to ASTs contain similar restrictions. Further, these limitations are impractical given the other specific sections of the rule such as cathodic protection and specific illumination requirements such as those found at 10.3.c. "minimum of 50 foot candles or 100 lumens." Electricity to power these types of systems must come from somewhere.

5.1.a.5. Includes "safety hazards" within the operational and maintenance plan for ASTs. This requirement is completely unnecessary. WV DEP is not a health and safety agency and any concerns related to safety issues are addressed by the comprehensive safety plan maintained at all coal mining operations pursuant to the requirements of state and federal mine safety regulations.

7.2.a.3.a. The acronym "NAPL" appears to be undefined in the rule. While obvious to most as an abbreviation of "non-aqueous phase liquids" NAPL also stands for the "National Amateur Pool League."

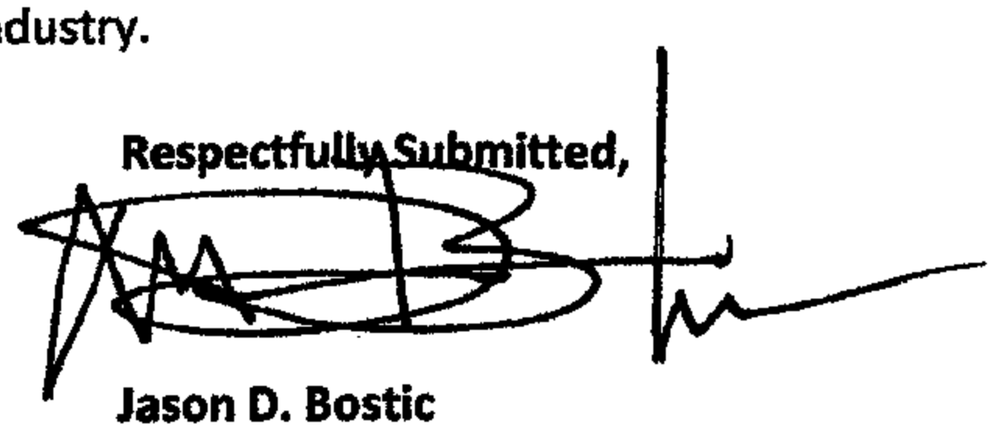
9.2 This section contains detailed requirements for the cathodic protection of metallic tanks. Coupled with other provisions of the rule that are imprecisely drafted, these provisions can be interpreted to apply to all tanks, regardless of tank construction, potential fire or explosion risk, or the age of the tank and the results of tank-specific testing and evaluations. Additionally, installation of these systems on existing tank bottoms is simply impractical, presenting an entirely different set of potential health, safety and environmental concerns.

9.4.e. This section of the proposed rule requires "repairs" to panting and coating requirements including "rust spots, blisters, peeling and cracking." This entire section is simply unworkable. Paint will peel and bubble and never compromise the integrity of AST. Repairs should only be required when such cosmetic issues may lead to structural integrity issues. Additionally, the cosmetic repairs mandated by this section would qualify as "major modifications" according to section 2.42, triggering notification by the company and approval by the agency to paint a tank.

Conclusion

WVCA appreciates the opportunity to offer comments on the draft emergency rule. We hope the comments demonstrate the extent to which the proposed rule is inflexible and overly detailed, does not reflect the best approach to regulation so as to prevent impacts to public water systems and fails to acknowledge routine situations encountered on mining and reclamation operations by frustrating the administration of regulatory programs specific to the coal industry.

Respectfully Submitted,



Jason D. Bostic
Vice-President

Cc: **Harold D. Ward**
Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

Lewis A. Halstead
Deputy Director
Division of Mining & Reclamation
West Virginia Department of Environmental Protection

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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.

<u>AST Size / Capacity</u>

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.

<u>Submission of SPCCs to WV DEP</u>

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

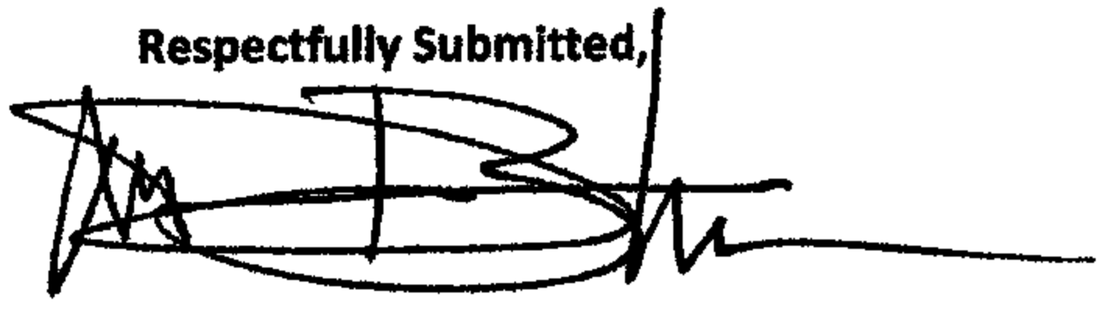
Under the proposed interpretive rule, ASTs containing CERCLA listed / identified substances are automatically categorized as Level Three tanks. As previously noted, WVCA feels that an ASTs proximity to a public water intake and ZCC should be the determining factor in classifying a tank as Level One. 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

WVDOT-DOH comments on proposed AST rules

47-63-1 The code & the proposed rules treat the ASTs as if all ASTs are metal or steel. While many inspection & maintenance parameters ~~are~~ are similar, there are numerous inspection & testing requirements that can not be applied to regulated plastic ASTs, specifically our ~~double walled~~ brine tank. These ~~tank~~ brine tanks are plastic. Most are double walled; however, some are single walled with a secondary ~~containment~~ containment wall. ~~There are~~ It is not reasonable to expect any tank wall ~~loss~~ thickness loss as a result of weathering or material (brine) content. There tanks are transparent & it is easily visible if the inner tank leaks into the interstice. # To the best of our knowledge there are not continuous release detection monitoring devices ~~that~~ available for plastic tanks

Sign size is arbitrary. Our traffic engineer designed a sign that meets the informational requirements of the code. An 18" height by 24" wide sign easily holds this information

The DOH believes that the requirement to provide proof of Registration requirements, Payment of annual registration & proof of financial responsibility is over burdensome unless the WVDEP plans on issuing a certificate of compliance each year based on the registration process & payment of the AST registration f-c. AST

Thank you for your effort to protect the waters of WV

Laura A Corley Pinchart
Assistant to the
State Highway Engineer
1900 Kanawha Blvd. E
Bld 5 Rm 148
Charleston, WV

WEST VIRGINIA

Comments of the

West Virginia Manufacturers Association

regarding

47 SCR 63

Aboveground Storage Tanks

July 30, 2015

I. Introduction

The West Virginia Manufacturers Association is a statewide trade association comprised of hundreds of members dedicated to the advancement of manufacturing in West Virginia. We have been intimately involved in the development of the Aboveground Storage Tank Act and associated rulemakings, and we welcome this opportunity to provide the following Comments with regard to proposed 47 CSR 63, Aboveground Storage Tanks.

II. Comments

A. General Comments

1. **Piping.** At multiple places throughout the proposed rule the DEP refers to standards for piping. (See, e.g., Sections 2.46 and 2.47, which refer to "associated piping"). The DEP has no authority under the AST Act to regulate piping as a separate component. To the extent pipes extend from a tank to the first point of isolation, as appears to be contemplated by 8.7, such piping is part of the AST. We urge the DEP to revise Sections 2.46, 2.47 and all other sections where piping is referred to in a context that suggests it is regulated where it is not part of an AST.

2. **Regulatory Overreach.** The DEP expresses a strong preference for overseeing all aspects of a regulated AST's existence, from the time of its construction or installation (Section 3.4), through modification, nonuse, upgrading and closure. Of these, it is only authorized to regulate closures, in Section 5 of the Act. Otherwise, when and where regulated ASTs are located or go in and out of service are not for the DEP to micromanage through notices and approvals. It can, through this rule, establish standards that must be met for operating tanks, and has enforcement powers if those standards are not complied with. That should be sufficient for its purposes. Requiring notices or approvals before a tank can be constructed, modified or moved is not countenanced by the Act.

3. **Corrective Action**. At some of our facilities tanks are located on or near areas that are Solid Waste Management Units under the Resource Conservation and Recovery Act, are subject to state Voluntary Remediation Program agreements, or are otherwise undergoing

remediation. In those situations, corrective action under this rule may not be appropriate, and legal authority for all remediation should remain with the existing program. We believe that is what the phrase "unless directed otherwise by the Secretary" in Section 7.1 is intended to convey, but believe this might be more clearly stated in the Rule.

4. **Definitions.** We suggest that the DEP repeat the Act's definitions in this rule. While reviewing this rule, we found ourselves going back to the Act repeatedly to look at definitions such as "zone of critical concern" and "release." It would be useful to have all defined terms in one place, and we hope the DEP will repeat them in this rule.

5. **Cathodic Protection**. Cathodic protection is a reasonable requirement for regulated tanks that face the possibility of corrosion. In some circumstances, however, tanks are located at sites where there is no likelihood of corrosion, or where API 653 inspections have demonstrated that no corrosion is occurring. API Recommended Practice 651 states in the Introduction to Section 5, Determination of the Need for Cathodic Protection, that "[t]he decisions governing the need for cathodic protection should be based on data from inspections performed in accordance with API Std 653; corrosion surveys; operating records; prior test results with similar tank systems in similar environments; national, state and local code requirements; and recommendations made within this document." In other words, cathodic protection may not be needed in all circumstances, and this determination should be left to a NACE expert, based on all available information.

6. **Leak Detection.** We hope the DEP will give careful consideration to revising the leak detection requirements in the rule. It would be prohibitively expensive to raise tanks to place them on supports, or to empty tanks and put a double bottom in them, so that leaks can be seen from beneath. These are reasonable requirements for new tanks, but for existing tanks they are unnecessary.

   We detect leaks in a number of ways, but the principal way is during internal inspections. Corrosion occurs in a predictable fashion where attention is paid to regulated tank contents and tank environment, and much of the API 653 process is directed to determining the rate of corrosion, if any, that is occurring in regulated tanks. The evaluation of corrosion is done during internal inspections with special magnets that can tell where thin spaces are developing on the underside of a tank, and what the remaining life of the tank is expected to be. Re-inspections are set for one-half of the remaining service life of the tank. This is the best manner to detect leaks for existing tanks that cannot be viewed underneath without significant, and costly, alterations.

   There are other methods of leak detection, such as inventory control, and these are useful, but not as precise or helpful as the tank evaluations that we do for API 653 and other industry guidelines. Each of these other methods presents its own challenges. For example, doing inventory control requires holding tanks still for one or more days, with no inflow or outflow, while the level is checked. During this time the tank is taken out of service and is essentially unavailable. If this method is used, the amount of loss that indicates a release should be set at a level that is appropriate for the size of the tank, and would not result in false alarms. We believe that inventory control that can detect the loss of .5% tank volume per hour (e.g., expressed as gallons per hour) of product from a regulated tank would be a reasonable starting place.

B. **Specific Comments**

1. **Resolving Conflicts. §1.6.m.** Irreconcilable conflicts between the DEP's rules and manufacturers' recommendations and industry standards are to be resolved in favor of the rules. There are occasions when failure to follow industry standards or manufacturers recommendations could void a tank warranty or cause site problems. We suggest that the DEP add the phrase "unless the Secretary otherwise approves" to the end of this subsection.

2. **AST System. §2.2.** The DEP does not have the authority to regulate AST "systems." The Act regulates, and defines, aboveground storage tanks, and the scope of the Act and the definition of AST was the subject of much debate. To the extent it is useful in this rule, the AST definition can be repeated verbatim. If the reference to an "aboveground storage tank system" represents an attempt to change the working definition, and hence to expand the reach of the Act, we object to the change and suggest deletion of this term from the rule.

3. **Ancillary Equipment. §2.3.** There's no need to define ancillary equipment in Section 2.3, and define it differently in Section 2.2. Taken together, Sections 2.2 and 2.3 render it impossible to tell what is or is not part of an AST. Furthermore, the "ancillary system" definition in the proposed rule is much broader than the more limited "ancillary pipes and dispensing systems up to the first point of isolation" found in the AST Act.

4. **Piping. §2.6.** The last phase of this definition, "and piping, respectively" should be eliminated. Inspections are required for ASTs, including any piping before the first point of isolation. There is no authority for regulating piping generally. If the DEP retains the reference to piping, the final "and" should be changed to an "or" in order to make the definition internally consistent.

5. **Dispenser System. §2.18.** Dispenser systems will not necessarily meter out fluids, although that is often the case. More importantly, dispensers are only part of the AST, and therefore subject to regulation, up to the first point of isolation. For example, dispensing systems located after a cut off valve are not subject to regulation under this rule.

6. **Emergency Venting. §2.20.** Emergency vents should include tank construction and design, in addition to tank openings.

7. **Facility. §2.23.** "Facility" is defined in terms of sites that have or had a tank. The DEP might consider changing the definition to a "location at which there is an AST, there was an AST, or an AST is expected to be located..." Otherwise, the portions of the rule that refer to movement of an AST to a "facility" where there is no AST make no sense.

8. **Location. §2.34.** A "facility" is a location in Section 2.23, and a "location" in Section 2.34 is a facility. To avoid circularity, we suggest eliminating Section 2.34 and uniformly referring to a facility in the rule.

9. **Permanent Closure and Out of Service. §2.46 and §2.47.** Both refer to "associated piping" and, as noted above, there is no such thing as "associated piping" under the AST Act. In addition, the distinction between "permanent closure" and "permanently out of service" is difficult to discern. In both cases, once tanks have been rendered incapable of holding fluids they are no longer ASTs, and therefore no longer subject to regulation. The only distinction appears to be that those tanks that are cleaned of all residues are permanently closed, while permanently out of service tanks need not be cleaned to such an extent.

10. **Qualified. §2.51.** This definition assumes a broad knowledge by those who work with tanks and secondary containment that will be impossible to achieve in practice. Someone who is knowledgeable in AST design may not be qualified to opine on corrosion controls or release prevention equipment. We suggest the definition be changed to refer to those with experience, training and education who are knowledgeable about the matters on which they are engaged to work. In the alternative, the final "and" should be an "or."

11. **Release Detection. §2.53.** "Releases" are those spills that reach waters of the state or leave secondary containment. *W. Va. Code* § 22-30-3(16). Movement from a tank into secondary containment or an interstitial area may be worthy of monitoring as an indicator of tank integrity, but it is not "release detection." Similar changes should be made to other sections as well, notably Sections 2.54, 2.55, and 2.63, where the nature of a release is misrepresented.

12. **Temporarily Out of Service. §2.64.** The temporarily out of service status is unnecessary. Tanks may or may not be needed for 180 days, or even for years, but they don't go out of service during that time. If a tank meets the standards set by the DEP, there is no need for the DEP to set an arbitrary point at which they are in or out of service.

13. **Compartmented Tanks. §3.1.a.** If a compartment in a larger tank meets the definition of a tank, its contents should not be aggregated with other tank contents in determining whether they meet the AST threshold of 1320 gallons.

14. **Manifolded Tanks. §3.1b.** If there is a point of isolation between two manifolded tanks, those tanks should not be aggregated for purposes of determining whether they meet the AST threshold of 1320 gallons.

15. **Transfer of Registration. §3.1.c.2.** Those persons or companies who purchase facilities at which ASTs are in use will need to be able to use their tanks immediately upon transfer of ownership. Those selling tanks will want to be able to use them up until the time of transfer. Therefore, unless transfer of registration is allowed upon transfer of ownership, there will be a time when one party or the other is in violation under §3.1.c.2, absent special approval by the DEP. While requiring registration at time of use makes sense for new tanks, it does not for tanks that are changing ownership. In that event, §3.1.d has this right – amended registrations should be submitted within 30 days of tank transfer or other listed event, and use of the transferred tanks can proceed during that 30-day period. If tanks are otherwise in compliance with the law, allowing a 30-day grace period to reregister them is not unreasonable.

16. **Notice of Change of Tank Contents. §3.1.d.** If a tank has been registered in the past, and substances were listed as potential contents of that tank, the switch of tank contents should not require a three-day notice if the change is to one of the registered fluids. We suggest changing the language to reflect this: " . . . except for a registration form to amend registration for change in the substance stored in the tank and not previously registered, or relocation . . ."

17. **Notification of Installation. §3.4.** New tanks have to be registered before they can be used, and tanks that have been moved must be re-registered within 3 days. Given this notice to the DEP, there is no reason for a separate notification 30 days before installation. If the DEP wants to inspect new tanks, it can do so when it receives the registration form.

18. **Re-registration of Conveyed Tanks. §3.6**. When a tank is sold by its owner to a new owner, it has to be re-registered before it can be used. If so, there is no need for a change of ownership form. The change of ownership form should be abandoned in order to eliminate redundancy.

19. **Notice to Buyers. §3.6.a.** Nothing in the AST Act obligates a tank seller to apprise a tank purchaser of his or her obligation to register. This is the sort of hidden obligation that is easily forgotten at the time of transfer, and can result in a paperwork violation for something that adds nothing to environmental protection. Sellers have every incentive to deregister tanks once ownership passes to another entity, so that they are no longer paying fees. When they do so, the DEP will be aware of the existence of deregistered tanks, which will presumably result in an investigation.

20. **Re-registration of Tanks. §3.6.b.** As noted above, in connection with §3.1.b, when there is a transfer of a going concern, the prior owner cannot operate tanks unless they remain registered in its name, and the new owner cannot operate them until they are reregistered. This section does not allow for the easy transfer of registration and ownership. The DEP should allow for the parties to provide new registration data after a sale and transfer of ownership has occurred.

    There is no pressing need for tank registrations to be kept up-to-date to the minute. Sales of companies or their assets often do not occur on a predictable time schedule, and may even occur in stages. During the time the sale is taking place, and thereafter, the requirements of the Act and this rule will continue to apply to the owners and operators of tanks, regardless of the registration. It should be sufficient that the obligations to comply with the Act follow the tanks as they change ownership, whether or not registration is up to date. Allowing 30 days to change registration, as is proposed with the Change of Ownership Form in Section 3.6, will not interfere with the continuous protections afforded by the Act, and it would allow the parties a reasonable amount of time to change registrations.

21. **Certificates to Operate. §4.** There is no provision for automatic issuance of a certificate to operate. As regulated tanks cannot be used if no certificate has issued, (*see* §3.1.c.2) there could be periods of time, upon initial registration or sales of tanks, when a regulated tank will be in use but a certificate to operate will not have been issued. We suggest that

certificates to operate be issued upon completion of registration or re-registration, but subject to withdrawal in the event there are noncompliance problems.

22. **References to Permittee. §4.2.** The amendment of site-specific permits or plans refers several times to the "permittee," which will not be appropriate if there is a plan, and no permit, that must be changed in order to qualify for the alternative standards. The same is true, for example in §4.2.c., which refers only to permits. The reference should be made to the regulated tank owner or operator, instead.

23. **Amendment of Site-Specific Plans §4.2.a.** Site-specific plans or permits may be amended at the request of the tank owner to include "conditions pertaining to management and control of regulated tanks," if those conditions are sufficient to protect waters of the State. *W. Va. Code* 22-30-5(c). It is important to note the voluntary nature of this section; the fact that it allows industry standards in lieu of the other standards set forth in the rule; and the fact that the standards the tank owner or operator must achieve are not necessarily those described in the rest of the rule, as long as the provisions of the permit or plan are sufficient to protect state waters. Therefore, we suggest that the first sentence of Section 4.2.a be amended to read "For those entities subject to site-specific permits and plans, the Secretary may, at the request of an AST owner or operator and in lieu of the standards contained herein, amend those permits or plans to include conditions pertaining to the management and control of regulated tanks, to the extent necessary to protect waters of the State.

24. **Flexible Standards. §4.2.a.2.B.** Where an AST owner or operator elects to be covered by an alternative industry standard, every option under the industry standard is treated as a requirement. While this generally will be appropriate, there are some situations where the DEP may want to give relief from industry standards, such as where the tank owner wants to use a different, but more protective, standard. Instead of saying "the Secretary will interpret" the DEP may wish to say "the Secretary may interpret," which gives it flexibility to approve an alternative interpretation when it believes it is appropriate, but does not require the DEP to do so.

    We would also note that the parenthetical reference to "(API 653 Standards for Tank Inspection, Repair, Alteration and Reconstruction)" should probably have an "e.g.," in front, to confirm that it is an example, not the only industry standard that may be followed. In that event, it would read as "(e.g., API 653 Standards for Tank Inspection, Repair, Alteration and Reconstruction)."

25. **Tank Inspections. §4.2.b.** It is not clear what this section is intended to do. All regulated tanks are subject to inspection, regardless of the standard that applies. Is this intended to mandate inspections at the time the alternative standard is proposed? Or is it merely confirmation that Section 5.2 applies to alternative standard tanks, too? If the former, the Act does not mandate more than one inspection per year, and if the latter, it is unnecessary.

26. **Fire Codes. §§4.3.a and 8.3.a.** There is no reason to make state and local fire codes enforceable conditions in AST rules, any more than the DEP should require tank owners to pay, for example, their workers compensation premiums as a condition of tank siting.

Fire codes are sufficiently enforceable by the proper authorities without making them part of this rule.

27. **Inspection Space. §4.3.b.** Some smaller tanks come with their own secondary containment, with distances between the edges of the tank and the secondary containment of less than 3 feet that do not interfere with visual inspections. We urge the DEP to mandate a sufficiently unobstructed view to determine leakage, without specifying a certain distance.

28. **Installation Approval. §4.3.c.** This section refers to the Secretary's ability to approve an installation application for new regulated ASTs. We have reviewed the AST Act and can find no authority for the DEP to approve or disapprove sites for tank installation. The DEP can set standards for regulated tanks, and those standards might differ depending on where the regulated tanks are located, but there is no authority for the DEP to decide where each new regulated tank is to be placed.

    Even if the DEP had such authority, there is no reason to require that a West Virginia Professional Engineer confirm that "construction design criteria and engineering specifications indicate that sufficient controls are present to protect water supplies" within zones of critical concern. The whole purpose of the Act and the proposed rule is to set standards for preventing releases to public water supplies. Why is a professional engineer needed to certify that those standards are being met? Or is the intention that the PE will impose requirements in addition to those specified in the proposed rule and the Act?

    The DEP is setting standards that are protective of public water supplies. Regulated tanks that do not meet those standards will not be allowed to operate. The additional authority to approve new regulated tank installation that the DEP has abrogated to itself is unlawful and unnecessary.

28. **PE Qualifications. 5.2.a.1.** As the term "professional engineer" has already been defined as a West Virginia PE, what is intended by "[a] qualified professional engineer as determined by the State Board of Registration for Professional Engineers?" Will the Board be issuing AST qualifications for West Virginia PEs?

29. **Regulated ASTs. §5.2.b.** This section requires "owners or operators of an existing aboveground storage tank [to] submit a certification that each regulated AST and its associated secondary containment structure [has] been evaluated by a qualified individual and meets the standards established in this Rule." The word "regulated" should appear in front of the first use of the words "aboveground storage tank."

30. **Tank Certifiers. §§5.2.b.1. and 5.2.b.2.** The DEP does not have authority to prohibit Level 1 or Level 2 tank owners or their designees from certifying tank inspections in certain years; owners or their designees are allowed to certify that the inspections are done <u>every</u> year. *W. Va. Code* §22-30-6(d). These rule sections confuse the persons who must <u>perform</u> the inspection with those who must <u>certify</u> that an appropriate inspection was done. Inspections are only done by specified classes of experts; certification is done by either those experts or someone with authority over the regulated tanks, meaning the owners or their designees.

31. **Inspection and Certification. §5.2.b.3.** The inspection and certification section is confusingly written. Under the Act, only certain people may inspect, and those people and the owners may certify. Those requirements are set out clearly in the statute. There is no requirement that the evaluations be done annually, and the DEP appears to acknowledge that in this proposed rule. The DEP only requires the statutory inspection and certification every 3 years for Level 1 tanks, and every 5 years for Level 2 tanks. In between those statutory inspections the DEP seems to be requiring a different sort of evaluation of the tank, one not directed to tank integrity, but to whether there has been a change in the tank or secondary containment since the previous statutory tank inspection and certification.

    We do not oppose the alternative inspections that are mandated between the years of statutory tank inspections. The DEP is completely within its authority to require the formal, statutory inspection every 3 or every 5 years, but the rule is difficult to follow when both the statutory inspection/certification and the alternative, off-year inspection/certification use the same terms. It would be helpful if this were differently stated, perhaps by requiring the statutory "inspection" and "certification" every third or fifth year, and a "review" and "report" for the other annual evaluations that are intended to identify obvious changes to the ASTs.

32. **Certification Deadlines. §5.2.b.4**. This rule will likely become effective in the second quarter of 2016, with the first certification due in the fourth quarter of 2016. If the next certification is due on January 1 of the following year, 2017, it will be done only a month or so after the previous certification. We suggest that the first certification be 180 days after the rule becomes final, then on January 1, 2018, and then every January 1 thereafter.

33. **Not Fit for Service. §5.2.b.5.C.** There are times that a tank may not meet the minimum requirements of the proposed rule for many reasons that cannot be addressed immediately – a coating may need repair, but work cannot be done until the weather warms; secondary containment may be undergoing renovation, etc. – but the tank may still be fit for service. Given that tanks that are Fit for Service may have deficiencies noted, we assume that the DEP did not mean that any failure to comply with this rule renders a tank unfit for service. A Not Fit for Service designation should only be required where the tank poses an imminent threat of release, or otherwise there are questions as to the tank's ability to hold liquids.

34. **Spill Response and Prevention Plan. §5.5.** This should be called the Spill Response and Prevention Plan.

35. **Use of Plans as SPRPs. §5.5.b.1.D.** It appears that those who are having their permits or plans, such as a Groundwater Protection Plan, amended to include enforceable tank standards, cannot have such plans certified as an alternative to the SPRP. This seems backward to us. If a GPP is amended to include tank standards, those amendments have nothing to do with whether the GPP is acceptable for alternative certification as a SPRP. If anything, such amended GPPs are more suitable to serve as SPRPs than they were before amendment, when they would have automatically qualified as amended plans.

As a practical matter, many sites will likely amend GPPs to include both tank standards and qualifying SPRP information. This section would seem to make that more difficult.

36. **Signs. §5.6.b.** Signs are to be "clearly visible and legible from a public roadway, public right-of-way or from outside the containment area." We are aware of facilities that use large drainage systems as secondary containment, and/or have tanks that are clustered within secondary containment, such that the views of labels and signs are blocked by other tanks or equipment. We suggest that the DEP limit itself to setting criteria for the signs, as it has done, and not specify where they are visible from. It would be impossible to anticipate all the situations where tanks might be located near or far from observers, and we believe the size of the letters on the signs will be clear enough to read for those who are close enough to tell whether a release is occurring, and would have information to report.

37. **Pipe Signage. §5.6.c.** We agree that a tank owner should be able to tell what is flowing through the AST pipes, but we assume that placing this requirement in the signage section does not mean that the substances must be reported on signs. We further assume that the requirement that flow control points be identified does not mean that signs as large as those mandated for tanks are required. We suggest those points be clarified in the rule.

38. **Markings on permanently closed tanks. §5.6.d.** Tanks that have been permanently closed are no longer capable of holding fluids, are no longer ASTs as defined in the Act, and therefore are not subject to signage requirements.

39. **Emergency Reporting. §6.2.a.** Responsibility for calling emergency management agencies should be more circumscribed. Does this mean calling the police and fire departments, the local Emergency Planning Committee, the sheriff's office, or others? We presently report to the National Response Center, the state Spill Reporting Hotline, and 911 for significant spills and emergency situations. We believe the Spill Hotline should report to other emergency responders whatever it feels is appropriate, and allow the facility to respond to the release, rather than spend time looking up phone numbers.

40. **Corrective Action and Ongoing Remediation.** §7.1. Releases from ASTs may occur in areas that have already been studied, or are already undergoing remediation, pursuant to other environmental programs, such as the state Voluntary Remediation and Redevelopment Act or the federal Resource Conservation and Recovery Act. Some tanks sit on top of RCRA Solid Waste Management Units, for which closure plans are already in effect. We suggest the DEP address this by adding the following sentence to Section 7.1: "Owners and operators of ASTs that are subject to remedial requirements under other federal or state programs that include the area of the release shall respond to the release in accordance with such other state or federal program in lieu of the corrective action requirements of this Section."

41. **Adoption of Reportable Quantities.** §7.1. Nothing in the Act prohibits the DEP from adopting a threshold of what must be reported or remediated. We suggest that the DEP add the words "of a reportable quantity" after the word "release" in this rule, and define an RQ as a reportable quantity under federal law, or any release that could reach a water of the State.

42. **Threatened Releases. §7.1.** The requirements in Sections 6 and 7 of the Proposed Rule relating to releases and corrective action are confusing in the context of "threatened releases." For example, Section 7.1 establishes mandatory requirements to be undertaken "in response to any confirmed release or threatened release from an AST." However, if a threatened release was discovered and addressed pursuant to an investigation under Section 6.3, presumably the requirements of Section 7 (which otherwise appear to apply only to confirmed—i.e., actual—releases) would not apply. If this is the agency's intent, perhaps the clearest approach would be to delete the "or threatened release" language from Section 7.1.

43. **Corrective Action Plan. §7.5.e.** Is the "Corrective Action Plan" ("CAP") referenced in Section 7.5.e the same as the "corrective action work plan" referenced in Section 7.4.f? If so, the proposed rule should use consistent terminology; if not, more distinguishing terms should be used to avoid confusion. Further, Section 7.5.e mandates the submittal of a CAP, whereas Section 7.4.f appears to require the submittal of corrective action work plans "requested by the Secretary." Finally, Section 7.5.e.1 requires the submittal of a CAP within 90 days of the approval of a site characterization report, or within an alternative timeframe approved by WVDEP. Section 7.5.a allows the owner or operator to skip the site characterization investigation (including the site characterization report) if the owner or operator chooses to submit a CAP. We assume that, if the tank owner proceeds directly to the preparation of a CAP, the deadline for its submittal would always be on a case-by-case "alternative timeframe approved by WVDEP."

44. **Remedial Action Progress Reports. § 7.5.g.** Despite being titled "remedial action progress reports," this section repeatedly references "corrective action progress reports." Consistent terminology should be implemented.

45. **NAPL Corrective Actions. § 7.7.a.1.B.** As part of a request for a No Further Action determination, the owner or operator must include "[a] demonstration that NAPL has been addressed in accordance with subsection 7.3." This reference appears to relate to a provision that appeared in earlier iterations of this rulemaking that has since been deleted. (Section 7.3 now relates to affected or diminished water supplies.)

46. **No Further Action Letter. § 7.7.b.** If a NFA letter does not provide any protection against "previously incurred or potential future liability," it is not clear what relief is provided by the letter. Clarification as to the effect of a NFA letter would be useful.

47. **Compliance with Industry Standards. 8.1.a, 8.1.b., 8.2.a, 8.2.c, 8.4.a.** We agree that regulated tanks should be constructed and installed in accordance with an industry standard or code of practice, but it may not be practical to comply with <u>all</u> "applicable industry standards and codes of practice." (For example, STI and API standards may exist for a steel tank, and may differ somewhat. That is the case with, for example, API allowance of a weak roof-to-shell design, which the steel Tank Institute may not permit.) We suggest that the compliance with the manufacturer's requirements, and one applicable industry standard, should be sufficient.

48. **Tank Siting Approval. 8.2.f.** The DEP does not have authority to require tank owners to get approval before they can put tanks in place. It can establish standards with which

owners and operators must comply, but it does not have pre-installation approval authority under the Act.

49. **Piping Regulation. 8.3.b.** Piping connected to ASTs is already regulated, up to the first point of isolation; there is no need to specially reference it.

50. **Tank Gauging. 8.3.d.** Not every tank needs to be equipped with a gauge. In some circumstances, use of a gauge stick should be sufficient to determine the depth of tank contents.

51. **Vents. §8.6.e.** We suggest that, for consistency sake, the references to "vents" be changed to "venting" to agree with the use of that term in the definitions and in §8.3.a. Furthermore, the use of the word "vents" implies that there should be separate normal and emergency relieving devices, and this is not required by NFPA 30, API 2000 or OSHA 1910.106. One vent may be satisfactory for both purposes.

52. **Emergency vents. §8.6.e.2**. Section 8.3.a. mandates emergency vents only for regulated tanks storing flammable or combustible fluids. Section 8.6.e.2 states that "[r]egulated tanks ASTs shall be equipped with emergency vents to ensure that the safe pressure for the tank is not exceeded." We suggest that Section 8.6.e.2 be eliminated, since the same requirement is found in Section 8.6.e. If it is left in place, though, Section 8.6.e.2 should be amended to start "Regulated ASTs <u>containing combustible or flammable fluids</u> shall be equipped . . ." in order to limit the requirement for emergency vents to those ASTs where they are appropriate.

    In addition, Section 8.6.f.3 should be modified to clarify that a return to service does not mean that a regulated tank must have emergency vents installed if it does not hold combustible or flammable liquids.

53. **Prohibition on Weak Roof-to-Shell Designs. §8.6.e.5.** Weak roof-to-shell tank designs are still acceptable in industrial applications under API 653, and should not be prohibited for new ASTs where they are appropriate. They are expressly allowed for vertical tanks pursuant to NFPA 30 §22.7.1.2 (2015 ed.)

54. **Pipe Tightness Testing. 8.7.e.** Annual tightness testing for regulated piping will be difficult to perform. To perform tightness testing on the pipe, there must be isolation points at both ends of the pipe that is to be tested. In the case of ASTs, in almost all cases one end of the pipe will be at the tank, and the other end will be at the cutoff valve, which would be the first point of isolation. Therefore, it will frequently be difficult, or impossible, to do tightness testing. However, to the extent leak detection is required for a pipe, we believe the AST owner or operator should be able to use Leak Detection and Repair data for tanks that are in VOC service.

55. **Operating Valve Requirement. §8.7.g.** The meaning of "operating valve" in Section 8.7.g is unclear to us. We assume that this refers to a shutoff valve that is operable, as opposed to an "operating valve", which is sometimes used as a term of art for a valve that may serve other purposes in governing fluid movement in and out of the tank. We would appreciate confirmation of that fact.

56. **Alternative Pipe Tightness Testing. §8.7.i.** If all piping must have an annual tightness test, and API 570 is an acceptable alternative to pressure testing pipes, is there ever any need under this rule to pressure test pipes?

57. **Corrosion Prevention. §9.1.** Not all ASTs will require active corrosion prevention. Some tanks are not in locations where corrosion will occur, or can be placed on a foundation of crushed stone or other substance that provides drainage and no contact with electrolytes. If a National Association of Corrosion Engineers certified expert is prepared to affirm that corrosion is not likely to occur, given the tank's structure, location or operational history, additional measures should not be required. We believe that is what is intended in Section 9.1, and suggest that it be amended to state that "The owner or operator shall ensure that all regulated ASTs ~~systems~~ are maintained with those corrosion prevention measures that are necessary ~~in order~~ to prevent releases."

58. **Cathodic Protection Systems. §9.2.** Cathodic Protection is just one of the possible means of corrosion prevention, but some aspects of Section 9.2 (e.g., 9.2.g) suggest that cathodic protection might be required for all regulated tanks, particularly following upgrades. We suggest that this be cleared up by beginning Section 9.2 with: "To the extent that a cathodic protection system is used as corrosion prevention, the owner or operator shall . . ."

59. **Impressed Current Checks. §9.3.c.** We are seeking confirmation that the 60-day checks on impressed current rectifier need not be performed by a NACE expert, but can be done by qualified plant personnel. Checking on whether electricity is being provided to the rectifier will not require NACE expert skills. We believe that is also the DEP's position, but we would appreciate confirmation.

60. **Verification of Impressed Current Cathodic Protection Systems. §§9.3.b.1 and 9.3.d.** Section 9.3.b.1 requires checking of cathodic protection systems by a NACE expert every 3 years, and Section 9.3.d requires checking impressed current for cathodic protection every year. API 651 requires checking of the system every year, and the every 3-year requirement should be eliminated.

61. **Tank Coatings. 9.4.a.** We do not believe that coatings should be required for all regulated ASTs. Section 9.4 seems to state that regulated metallic tanks may meet corrosion prevention requirements by applying an exterior coating, but Section 9.4.a requires a coating for all tanks, even if other corrosion prevention is being used.

62. **Monitoring of Tank Transfers. §10.1.a.** It is not clear to us what sort of constant monitoring is required under Section 10.1.a. If it is monitoring of transfers from a regulated tank to a truck, or vice versa, the truck driver or plant personnel will likely be present in person, and the monitoring is appropriate. If the transfer is remotely controlled through permanent piping, as is often the case as fluids move between tanks at our facilities, that occurs too frequently to have someone present at each tank that is receiving or discharging fluids. Section 10.1.a.1 does not provide sufficient relief in that regard.

63. **Spills and Overfills Within Secondary Containment. 10.1.b.** Spills and overfills that occur outside of secondary containment may be subject to Sections 6 and 7 of this rule,

but those spills and overfills that occur within secondary containment are not releases and are not subject to corrective action.

64. **Secondary Containment. 10.2.e.** The supposition appears to be that all secondary containment will be in a diked area. While that will often be the case, in some instances secondary containment will be double walled tanks, or common drainage areas. This is recognized in Sections 10.2.h and 10.2.i. Accordingly, reference to national standards such as STI and API may not be appropriate in all situations.

65. **Transfers Within Secondary Containment. §10.2.g.1.C.** Transfers between regulated ASTs and tank trucks may justify having someone present during the transfer, but many transfers are by fixed piping from one tank to another. Such piping is generally beyond the first point of isolation, and therefore is not subject to this rule, because piping is no longer associated with an AST once it passes beyond the cutoff valve or other control point. Furthermore, such transfers from and to storage tanks occur constantly, and are often remotely controlled from an operations center. Having a person physically present to monitor all transfers from or to tanks is not practical.

66. **Discharge from Secondary Containment. §10.2.k.** Tank owners remove fluids from secondary containment on a regular basis, generally after a precipitation event. Keeping track of every discharge for a year is unnecessary recordkeeping. There is no advantage to recording routine discharges from secondary containment after rain events.

    If the purpose for the reporting requirement is a concern that some of the secondary containment discharges are directly to waters of the state, we suggest that this be addressed through NPDES permitting. Almost all discharges from secondary containment are routed through wastewater treatment systems, and therefore do not pose any pollution problem. We propose that tracking of intentional discharges from secondary containment only be required if the discharge is directly to waters of the state.

67. **Use of Flapper Valves. §10.2.i.5.** We are not certain why flapper valves cannot be used for secondary containment structures. In many circumstances flapper valves allow passage to the wastewater treatment system, and are appropriate in that context. We suggest that flapper valves not be prohibited, but be allowed wherever a discharge through them would not be a "release" as that term is defined in the Act.

68. **Due Dates for Secondary Containment Construction. §10.2.1.** Requiring secondary containment within a few months of the effective date of the rule allows too little time for its constructions. Secondary containment can reflect a large capital cost and take significant amounts of time to plan, engineer, and construct. While the Groundwater Protection Act has ostensibly required secondary containment for years, the DEP has been inspecting facilities with Groundwater Protection Plans for years and never required upgrades to secondary containment. To the extent it is doing so now, it would be more appropriate to allow at least 2 years after the rules become effective for completion of secondary containment construction.

69. **Leak detection. §10.3.** We appreciate the DEP's willingness to consider alternative means of leak detection, and want to confirm that the methods that we have used successfully in the past will be acceptable.

The principle way of identifying leaks is two-fold: API or other industry standard internal tank inspections and regular external tank monitoring. The internal tank inspections are done in accordance with API 653 or another industry standard, and can identify changes in tank floor thickness, whether occurring as a result of external or internal corrosion. By measuring the change in thickness, the tank owner can calculate the remaining life of the AST shell, and schedules the next internal evaluation for one-half that time, introducing a safety factor of 2. The external tank monitoring is, for all practical purposes, constant at our chemical and manufacturing facilities. ASTs are regularly monitored both by sight and smell as our employees work around the tanks, and the requirements of this rule will only make that more common.

What we cannot do, and what we hope the DEP will confirm is not expected, is to retrofit existing tanks so that they can be visually inspected, or have detection equipment installed, beneath the tanks. It would be prohibitively expensive, and a huge interference with plant operations, to lift tanks for that purpose, or to install double bottoms in tanks so that an interstitial area is created. Beyond the cost of changes to the tank shells themselves, the piping and other ancillary equipment would have to be adjusted as well.

While inventory reconciliation is a possible means of leak detection, it has limits as well. Manufacturers' stated leak detection rates are often more aspirational than effective, and may not be possible to achieve with larger tanks, particularly when there are large amounts of product moving in and out of tanks, from tank trucks as well as internal transfers. A half percent (.5%) tank volume per hour leak detection rate should be achievable, though, and is worth considering as a standard for those who elect to use that method.

70. **Leak Detection for New Level 1 ASTs §10.3.d.** New Level 1 tanks have to be double-walled, double-bottomed or installed with a release prevention barrier that allows for releases to be visually observed. We support establishment of different standards for new tanks, but there are a wide range of different types of leak detection that might not be encompassed by the language of the rule. Tanks may be put on pillars, or directly on a concrete pad with channels that slope out to carry releases to where they can be seen. Each is a reasonable leak detection system, but neither is mentioned in 10.3.d. If they are intended as acceptable leak detection measures, we would appreciate confirmation of that fact.

71. **Tightness Testing. §10.3.f.** Criteria for tank tightness testing are set out in §10.3.f, but tank tightness is not one of the specified means of leak detection in §10.3.e. Is the DEP requiring tank tightness testing for all tanks? If so, we would object. We suggest this Section be amended by adding tightness testing as one of the acceptable release detection methods.

72. **Nonoperational Tanks. §11.1.** The DEP does not have authority under the AST Act to declare tanks to be "nonoperational" other than in those situations where the tank does not meet tank criteria set in accordance with the Act or these rules. Tanks may be kept in service after June 6, 2014 but never be used (if, for example, they are emergency overflow tanks). Tank owners should not have to seek permission from the DEP to

maintain empty tanks for more than 7 years and keep them available for future use, as long as those tanks meet the requirements of the Act and these rules.

73. **Temporarily Out of Service Regulated Tanks. §11.2.** There is no provision in the AST Act for regulating tanks that are "temporarily out of service" (TOS). First and foremost, regulated tanks that are TOS may be holding contents, but aren't moving contents in and out, according to the definition of TOS in Section 2.64. In other words, such a TOS tank is storing fluids, which is the purpose of an aboveground storage tank. The fact that fluids are not moving in and out has no bearing on whether the regulated tank is fit to hold those fluids. That is determined by compliance with the regulated tank standards established by the DEP.

    We strongly object to the requirement that TOS regulated tanks must be emptied upon passage of 180 days. There are many situations where a tank might hold fluids for half a year or more. Regulated tanks that meet the requirements of the Act should be able to store fluids forever, as long as they meet the standards established by the DEP.

    Note that TOS regulated tanks are subject to the same continuing maintenance and inspection requirements. That being the case, we question the justification for requiring a notification of a change in tank status if there is no movement in or out of the tank for 6 months. And when would the notification be given? One may not know whether a tank will be used over a 180-day period until the 180 days has passed. Is the notification required within 180 days of that period? Even if the regulated tank owner knows that the AST won't be used in the next 180 days, why give notice when he or she has to meet the same tank standards whether or not the tank is TOS during that period?

    The TOS section is internally inconsistent, as well. Regulated tanks that are TOS are to undergo regular annual inspections and certifications (11.2.a.5) but they are also required to undergo the annual inspection when they are put back in service (11.2.b.1.). One of those, but not both, is necessary.

    It is not clear to us what the DEP intends by its regulation of TOS ASTs. We suspect that this is an example of the DEP's professed intention to make the AST program operate in the same fashion as the UST system. The two types of tanks are quite different, and program one is not a fit for the other. The UST program is principally directed to regulating fuel tanks at retail gasoline establishments, where constant fluid movement is expected if the tank owner is to make money. If there is no product flowing in and out of those tanks for a half year, there is likely some reason that may require additional inquiry. That is not the case at chemical facilities and other manufacturing sites, where tanks may hold a fluid that is used only at intervals that could exceed 180 days.

    The TOS designation serves no purpose other than to generate paperwork. Let regulated tank owners manage their tanks, in accordance with the DEP's reasonable regulations, and leave out the requirements for notifying when ASTs are "nonoperational" or "TOS."

74. **Reporting Changes in Regulated Tank Status. §11.3.** We do not agree with the requirement that we report a change in status from currently in use or temporarily out of service. As we have noted before, the DEP does not have authority to require this, and it serves no purpose other than to generate paperwork or its electronic equivalent. Tanks

are either available to be used, and are in compliance with the DEP's requirements, or they are not. If they are not, they cannot be used to store liquids. Manufacturing sites will be constantly taking tanks in and out of service. If they are using a tank that has met all the requirements of the Act, there is no need for the DEP to track when or how often it is filled or emptied.

75. **Delivery Prohibition. §12.1** - The DEP has no authority to prohibit anyone from depositing fluids into an AST without receiving proof of registration and payment of fees. If an unregistered tank is being used, or fees have not been paid, the tank owner is subject to fines and/or prosecution. Dragging in the product deliverer is outside the express authorization of the Act and is unnecessary.

76. **Use of a Locking Device. §12.2.c.** The DEP should not, under any circumstance, attach a locking device to an AST because it believes the tank should not be receiving product, unless it has obtained an injunction or other court order to do so. Locking devices could present a significant danger to plant personnel if a chemical process cannot be controlled by shutting off or turning open a valve. In the rare event where an emergency lockout is needed, there are expeditious court procedures available that would allow the DEP to request emergency authority to act, and would allow the tank owner to explain why a lock should not be put in place.

III. Conclusion

We hope the Department of Environmental Protection will give careful consideration to these comments. If you should have any questions, please contact me.

Rebecca Randolph, President
West Virginia Manufacturers Association
Rebecca@wvma.com
(304) 342-2123

WEST VIRGINIA

Comments of the

West Virginia Manufacturers Association

regarding

47 SCR 64

Aboveground Storage Tank Fee Assessments

July 30, 2015

I. Introduction

The West Virginia Manufacturers Association is a state-wide trade association comprised of hundreds of members dedicated to the advancement of manufacturing in West Virginia. We have been intimately involved in the development of the Aboveground Storage Tank Act and associated rulemakings, and we welcome this opportunity to provide the following comments with regard to proposed 47 CSR 64, Aboveground Storage Tank Fee Assessments.

1. **Transfer of Tank Ownership. §3.1.b.** The DEP has declared that "[t]he transfer of [AST] ownership shall not be considered complete until the Secretary receives a completed amended registration and payment of the transfer fee." As an initial matter, the DEP simply does not have the legal authority to decide when ownership of a tank transfers from seller to purchaser. The DEP can control how ASTs are managed, and forbid their use without registration, but it cannot control who owns the tanks.

   While the DEP can control whether registration is transferred along with tank ownership, we would urge it to be more flexible, for the reasons we provide in our comments on proposed 47 CSR 63. Sales of tanks, when they occur as part of an industrial facility purchase, are often uncertain events. As changes to the sale agreement are negotiated back and forth, the time for actual transfer of ownership usually changes as well, frequently being moved back on multiple occasions. Therefore, it is often difficult, if not impossible, to tell the DEP exactly when ownership of the property, and any tanks located on site, will occur until shortly before the sale. Even if the exact time and date are known well in advance, in order to have the registration (and the concomitant right to control the tanks) transfer on the date of sale, the prospective purchaser would have already had to pay the transfer fee and gotten certificates to operate in its name in order to operate the tanks at the time of ownership change. That would be impossible, because only owners can register tanks.

   It is important that, when the property and tanks transfer to the new owner, the authority to operate the tanks transfer at the same time. That cannot happen if the seller and buyer

need to wait for approval from the DEP for the transfer. Instead, we recommend that the DEP allow 30 days post-sale for the new owner to re-register tanks and pay any outstanding fees. Under the AST Act and the proposed AST Rule, the tank owner is responsible for proper tank operation as soon as title to the tanks passed, which allows the DEP to always have a responsible party to turn to when some question arises. The payment of fees, and changing of names on registrations, is not time-sensitive, and allowing time for it to occur post-sale would not interfere with the proper implementation of the Act. If payment and registration do not happen in that 30-day period, the DEP has reserved to itself the ability to assess penalties, which should be sufficient incentive to bring about compliance.

2. **Annual Response Fee. §3.3**. We understand the difficulty of precisely determining the fees needed for the Protect Our Water Fund, but the DEP doubtless has sufficient knowledge at this time to have a good idea of how much it needs to raise from regulated tanks in order to have $1,000,000 in the Fund, after it has banked 50% of the initial registration fees in accordance with §5.1. Without a figure in the rule, or some method of calculating fees, we are left with nothing to comment on. If nothing else, we would like to see how the DEP intends to differentiate between Level 1 and Level 2 tanks in assessing this fee. We urge the DEP to state in the rule what the initial fee(s) will be when assessed in 2016. Otherwise, the rule is excessively vague.

3. **Penalty for Late Payment. §6.2.** A 50% penalty for late payment is too high. A penalty of 5% per month, stopping at 25% in 5 months, is more reasonable, and still provides an incentive to pay in a timely fashion. Furthermore, the late payment penalty kicks in 30 days after the date on the invoice, regardless of when the invoice is received. We are certain that the DEP intends to be prompt in mailing dated invoices, but there is often time spent in internal routing of dated material, both at the DEP and at our facilities, and it takes time for our larger members to process payments internally. If the DEP is going to assess a penalty for late payment, it should start with some sort of assurance that tank owners will have 30 days from actual receipt of the invoice to make the payment.

4. **Indexing of fees. §7**. Registration fees are set by statute; we do not believe there is authority to change them, to adjust for inflation or otherwise. Response fees do not need to be adjusted for inflation, as they are recalculated each year in order maintain $1,000,000 in the Protect Our Water Fund. That leaves only annual operating fees to be adjusted automatically under the proposed rule. While the DEP may have authority to do this, we suggest that it reserve the right to do it, rather than mandate it. We suspect that the administrative fees will be more than sufficient to operate the program, especially given its overlap with other programs (the Groundwater Protection Program, the NPDES program, etc.) which will result in significant cost sharing. Each year, the DEP could evaluate the programs and decide whether an increase in the administrative fee is needed. As the rule is presently proposed, fees increase automatically, whether an increase is needed or not.

III. Conclusion

We hope the Department of Environmental Protection will give careful consideration to these comments. If you should have any questions, please contact me.

Rebecca Randolph, President
West Virginia Manufacturers Association
Rebecca@wvma.com
(304) 342-2123

WEST VIRGINIA

Comments of the

West Virginia Manufacturers Association

regarding

47 SCR 65

Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment

July 30, 2015

I. Introduction

The West Virginia Manufacturers Association is a state-wide trade association comprised of hundreds of members dedicated to the advancement of manufacturing in West Virginia. We have been intimately involved in the development of the Aboveground Storage Tank Act and associated rulemakings, and we welcome this opportunity to provide the following Comments with regard to proposed 47 CSR 65, Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment.

1. **Penalty Assessment. §6.** The penalty assessment matrix provides no, or very limited, guidance as to what constitutes minor, moderate or major "deviation from requirements" or "potential for harm." All such determinations are left to the discretion of the DEP. All penalties are decided on a "case-by-case basis" (§§6.1.a and 6.1.b) or "discretionary" judgments (§6.1.d). That initial penalty can then be adjusted up or down by application of equally vague "penalty adjustment" factors" (§6.2).

We believe that more objective criteria can be developed. For example, a major potential for harm should involve possible death or substantial bodily injury, or significant and widespread environmental damage. A major deviation should be a knowing violation of the Act or regulations, not a negligent failure of any kind. If the matrix is to have any meaning at all, it must provide some guidelines to those who are being punished; if not, it operates unpredictably.

It should be borne in mind that the DEP can assess multiple days of penalties for most of the violations that it assesses, subject to the limitations discussed below. There are few violations that are not treated as continuing violations, which causes penalties to rise quickly. Therefore, if the DEP adopts meaningful penalty guidance it will still maintain enough authority to dissuade malfeasance. That power should be wielded in a fair and equitable manner, though.

2. **Multi-Day Penalties. § 6.3.** Multi-day penalties should not apply to failure to register, failure to obtain a certificate to operate, or for providing false information. For those transgressions the civil penalty is limited to $10,000 per tank. *W. Va. Code* §22-30-17(b). Furthermore, the civil penalty limit on a daily basis is $10,000 for each day of violation, not for each violation. If there are multiple violations on any given day, the limit for civil penalties is still $10,000 for all the violations.

III. Conclusion

We hope the Department of Environmental Protection will give careful consideration to these comments. If you should have any questions, please contact me.

Rebecca Randolph, President
West Virginia Manufacturers Association
Rebecca@wvma.com
(304) 342-2123

WVONGA
WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION

July 30, 2015

By Hand Delivery and E-mail

Joe Sizemore
West Virginia Department of Environmental Protection
AST Rule Comments
601 57th Street, S.E.
Charleston, WV 25304

Re: Comments on Proposed Legislative Rules Entitled "Aboveground Storage Tanks" (47 C.S.R. 63), "Rules Governing Aboveground Storage Tank Fee Assessment" (47 C.S.R. 64) and "Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment" (47 C.S.R. 65)

Mr. Sizemore,

Please find enclosed comments by the West Virginia Oil and Natural Gas Association on the above-referenced proposed legislative rules implementing the Aboveground Storage Tank Act. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Nicholas DeMarco
Executive Director

West Virginia Oil and Natural Gas Association
Comments Regarding Proposed Legislative Rule 47 C.S.R. 63
"Aboveground Storage Tanks"
July 30, 2015

The West Virginia Oil and Natural Gas Association ("WVONGA") appreciates the opportunity to provide the following comments on the West Virginia Department of Environmental Protection's ("WVDEP") proposed legislative rule 47 C.S.R. 63, entitled "Aboveground Storage Tanks" (the "Proposed Rule"), which was filed with the West Virginia Secretary of State on June 25, 2015 and which is intended to implement the Aboveground Storage Tank Act, W. Va. Code §§ 22-30-1 *et seq.* (the "AST Act"). Chartered in 1915, WVONGA 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 construction, environmental services, drilling, completion, gathering, transporting, distribution and processing. WVONGA's 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 80% of the production and 90% of the permits, operate more than 20,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses.

Specific Comments

The following are WVONGA's comments and suggestions on specific sections of the Proposed Rule:

1. Graduated Levels of Regulation for ASTs

While the amendments to the AST Act adopted in March 2015 made significant progress towards ensuring meaningful protection of West Virginia drinking water supplies by focusing the key substantive requirements of the statute on those categories of "regulated" (i.e., Level 1 or

Level 2) tanks determined to have the greatest potential to impact a public water supply, a review of the Proposed Rule reveals that there is very little difference in the substantive requirements applicable to Level 1 and Level 2 ASTs. Indeed, the primary differences between the requirements imposed for Level 1 and Level 2 ASTs appear relate to the timing for implementing required upgrades and frequency of inspections by a certified inspector. WVONGA does not believe that this is what the Legislature intended by its directive to develop a regulatory program for regulated ASTs and secondary containment "that takes into account the size, location and contents of the tanks and sets out tiered requirements for regulated tanks." W. Va. Code § 22-30-5(a). As currently drafted, the significant new requirements to be imposed on low-risk Level 2 tanks—many of which already are subject to regulation under one or more other state or federal programs—does not reflect a reasonable assessment of the relative potential for harm associated with these ASTs. Accordingly, WVONGA urges WVDEP to undertake a global reassessment of the requirements for Level 2 ASTs contained in the Proposed Rule and tailor those requirements accordingly

2. Site-specific Determination of Regulated Level 1 ASTs

The statutory definition of "regulated level 1 aboveground storage tank" includes "any AST system designated by the Secretary as a level 1 regulated tank." W. Va. Code § 22-30-3(13)(A). WVONGA requests that the Proposed Rule be revised to clarify that any such site-specific designation by the agency must be based on a formal determination that the identified AST clearly exhibits a high potential for harm to public health or the environment due to its contents, size or location, despite the fact that the tank does not meet any of the alternative criteria for a Level 1 tank. Such a determination should be made by order, entered after notice and an

opportunity for objection and a prompt hearing before the Secretary, and such order should be subject to appeal to the Environmental Quality Board.

3. Modification of Zones of Critical Concern

Following the initial October 1, 2014 deadline for tank registration under the original 2014 enactment of the AST Act, WVDEP notified those AST owners who owned tanks located within a designated "zone of critical concern." When the AST Act was amended in 2015, the statutory definition of "zone of critical concern" did not change, other than the deletion of language extending the zone for one quarter of a mile downstream from a public water supply intake. Because significant regulatory requirements and economic consequences attach to those ASTs located within zones of critical concern (which, in turn, determine zones of peripheral concern), WVONGA requests that WVDEP provide public notice and an opportunity to comment on any modification of designated zones of critical concern that occur after June 12, 2015, the effective date of the amended statute. AST owners should be afforded an opportunity to evaluate the accuracy and appropriateness WVDEP's determinations of these zones before they are adopted and implemented by WVDEP.

4. "Public Surface Water Influenced Groundwater Supply Source Area" Criteria for Regulated Level 1 ASTs

The statutory definition of "regulated level 1 aboveground storage tank" includes an AST "located within a zone of critical concern, source water protection area, [or] **public surface water influenced groundwater supply source area . . . .**" W. Va. Code § 22-30-3(13)(A) (emphasis supplied). "Public surface water influenced groundwater supply source area" is not a defined term in either the AST Act or the Proposed Rule; however, the definition of "zone of critical concern" in the Act begins with "for a public surface water supply source and for a public surface water influenced groundwater supply source . . . ." Therefore, it is presumed that zones of critical

concern encompass any "public surface water influenced groundwater supply source areas" for purposes of the Level 1 regulated tank definition. WVONGA requests confirmation of that interpretation, and that there are no "public surface water influenced groundwater supply source areas" separate from, or not included within, zones of critical concern.

5. AST System [§ 2.2]

Throughout the Proposed Rule, WVDEP uses the term "aboveground storage tank system" when discussing various regulatory requirements. This term is defined extremely broadly to mean "an aboveground storage tank as defined by W. Va. Code § 22-30-3(1), its piping, and all its ancillary equipment, including dispensing systems, spill containment devices, overfill protection devices, secondary containment systems, and any associated release detection equipment, up to the first point of isolation." § 2.2. The scope of WVDEP's regulatory jurisdiction under the AST Act is limited to "aboveground storage tanks," as defined in W. Va. Code § 22-30-3(1). It is this key term that WVDEP should adhere to when developing its regulatory program under the AST Act. To the extent that the definition of "AST system"—and thus the reach of the Proposed Rule—is broader than or expands upon the statutory definition of "aboveground storage tank," WVONGA opposes such a change. In particular, the inclusion of "secondary containment systems" within the proposed definition of "AST system" results in significant confusion elsewhere in the Rule. For example, Section 10.2 requires that AST systems **have** a secondary containment system, which, if read literally in conjunction with this definition of "AST system," would require secondary containment of the AST system's secondary containment (i.e., tertiary containment).

6. Reconciliation of Conflicts [§ 1.6.m]

The Proposed Rule states that "[w]here there is an irreconcilable conflict between the manufacturer's recommendation, a standard or recommendation published by an industry or

professional organization, and a requirement in this Rule, this Rule applies." § 1.6.m. It is unclear how this provision will be applied in practice, particularly where the Proposed Rule frequently requires compliance with manufacturer's recommendations **and** industry standards (either specific standards or stated more generally) **and** specific requirements as set forth in the Proposed Rule. *See, e.g.,* §§ 8.1.a, 8.1.b, 8.2.a, 8.2.c. This approach makes it very difficult to determine just what requirements are applicable at any given time. Furthermore, it is particularly unclear how this requirement is to be applied in the context of Section 4.2, which allows a tank owner to modify an existing permit or plan to specify conditions for the management and control of regulated tanks. Incorporation of industry standards into such permit/plan amendments is authorized, but does Section 1.6.m essentially mandate that those conditions match the requirements of the Proposed Rule (which begs the question of why a permit/plan amendment would be undertaken in the first instance)?

7. Definitions [§2]

a. "Cathodic Protection Tester" [§ 2.4]. For consistency with the language of Sections 9.2.b and 9.3.b.1, the language of the end of the first sentence of this definition that reads " . . . as applied to buried or submerged metal piping and tank systems" should be revised to "as applied to ~~buried or submerged~~ metal piping and tank systems <u>in direct contact with soil or other electrolytes.</u>"

b. "Confirmed Release" [§2.13]. Nothing in the AST Act prohibits WVDEP from adopting a reasonable threshold of what must be reported or remediated. For example, as currently drafted, a minor release outside of secondary containment (e.g., less that one barrel of oil or condensate) that remains onsite and does not enter waters of the state would trigger the extensive remediation requirements of Sections 6 and 7 of the

Proposed Rule. Accordingly, WVONGA urges the adoption of reportable quantities that would trigger the release remediation procedures under the rule (e.g., any reportable quantity established by federal law, or any release that could reach a water of the state). *See also* WVONGA's comments below on Sections 6.2 and 7.

c. **"Corrosion Expert" [§ 2.14].** Similar to WVONGA's comment on the definition of "cathodic protection tester," above, the language at the end of the first sentence of this definition should be changed to "~~buried or submerged~~ metal piping and tanks <u>in direct contact with soil or other electrolytes</u>" for purposes of consistency with language in Sections 9.2.b and 9.3.b.1. WVONGA also suggests the deletion of the language "of the physical sciences and the principles of engineering and mathematics" from this definition as unnecessary and somewhat confusing. The remainder of language of this definition is sufficient to ensure the proper expert qualifications.

d. **"Currently in Use" [§ 2.16].** WVONGA suggests that the definition of "currently in use" be modified to state that this term means that "the AST is operational and is storing fluids or receiving or dispensing fluids <u>on a routine or periodic basis.</u>" At any point in time, an AST that is considered "operational" by the tank owner may not actually be storing fluids (i.e., recently emptied or cleaned) or be actively receiving or dispensing fluids, but those activities do occur on a routine or periodic basis.

e. **"Empty" [§ 2.21].** The Proposed Rule defines "empty" as "an AST and associated piping in which all materials have been removed using commonly employed practices such that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the AST system remain in the system. An AST containing 1,320 gallons or more of fluids is not considered empty." § 2.21. As an initial matter,

WVONGA notes that "associated piping" does not need to be specifically referenced in this definition, as the term "aboveground storage tank" already encompasses associated piping up to the first point of isolation. Any piping beyond the first point of isolation falls outside of the scope of the AST Act. Additionally, for purposes of clarity, WVONGA suggests revising the language of this definition as follows: "'Empty' means an AST ~~and associated piping~~ in which all materials have been removed using commonly employed practices such that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the AST system remain in the system, but in no case will an AST containing 1,320 gallons or more of fluids be considered empty. ~~An AST containing 1,320 gallons or more of fluids is not considered empty.~~"

f. **"Facility" [§ 2.23].** The Proposed Rule defines "facility" as "a location that currently contains **or that has contained** an AST system . . . ." § 2.23 (emphasis supplied). If an AST as defined by the statute is no longer present at the facility, then that facility should fall outside the scope of this rule. To eliminate confusion, WVONGA suggests deleting the "or that has contained" language from the definition of "facility." Additionally, for grammatical clarity, the first sentence of this definition should be revised to state that a "facility" means "a location that currently contains ~~or that has contained~~ an AST system, including any ~~that is located on the same or~~ geographically contiguous property ~~as the AST system,~~ that is under the same ownership or control, and that may be divided by a public or private right-of-way or an easement." *See also* WVONGA's comment on the definition of "location," below.

Additionally, WVONGA supports the second sentence of the proposed definition that would allow an oil or gas entity with multiple tanks at various locations to consider its (or its operator's) company office or laydown yard as its "facility" for purposes of AST registration. However, we request that that same concept be available for purposes of financial responsibility as well. This would allow the financial responsibility determinations to be based on the aggregate storage capacities of Level 1 and 2 ASTs rather than requiring the $5,000 minimums at every location, which would impose an unfair and unequal burden on those oil and gas companies with multiple locations. Accordingly, we request that the second sentence of this definition be revised to read: "However, oil or gas entities with multiple tanks at various locations may consider their or their operator's company office or laydown yard as their facility location for purposes of AST registration in Section 3, and may consider their aggregate Level 1 and Level 2 tankage as their facility for purposes of the financial responsibility requirements in Section 13."

g. **"Impermeable or Impervious" [§ 2.27].** WVONGA notes that nothing in the AST Act requires or even suggests the need for a quantitative permeability standard. The definition of "secondary containment" in the Act simply requires a "sufficiently impervious to contain fluids" standard, and if earthen, the containment must be able to contain the fluid "for a minimum 72 hours." W. Va. Code § 22-30-3(17). Accordingly, this definition should be revised to read: "~~Impermeable or i~~Impervious' means a material of sufficient thickness, density, and composition that ~~it is impenetrable or has a permeability of less than 1 x 10^{-7} cm/sec., and~~ will prevent the discharge to the ~~lands or~~ waters of the State or to soil outside of containment of any

fluid for a period of at least as long as the maximum anticipated time during which the fluid will be in contact with the material."[1]

h. **"In Contact with the Soil or an Electrolyte" [§ 2.29].** WVONGA suggest that this definition should be modified to read as follows: "'In contact with the soil or an electrolyte' means any portion of the AST system that physically touches the soil or any electrolyte such as water or which is not in direct contact with the soil or electrolyte and is separated from the soil or electrolyte only by a ~~casing, wrapping or other~~ material that is not waterproof." Certain casings or wrapping may, in fact, be waterproof and if used should qualify as adequate separation from the soil or electrolyte.

i. **"Location, Service Location or Site" [§ 2.34].** The Proposed Rule defines "location, service location or site" as "a facility where an AST system is located." § 2.34. "Facility," in turn, is defined as "a location that currently contains or has contained an AST system . . . ." § 2.23. Because it appears that a separate definition of "location, service location or site" is unnecessary, WVONGA suggests eliminating this definition and using the term "facility" consistently throughout the Rule.

j. **"Permanent Closure" and "Permanently Out of Service" [§§ 2.46, 2.47].** The definitions of "permanent closure" and "permanently out of service (POS)" appear to be largely redundant. Further, both definitions refer to the "AST **and associated piping**," which suggests that WVDEP proposes to regulate piping beyond the first point of isolation (i.e., the limit of regulated piping under the AST Act). *See* §§ 2.46

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[1] WVONGA notes that the term "impermeable" appears only once in the Proposed Rule, and relates to a cover required for contaminated soils stored onsite. *See* § 7.6.d. As the context for this term is unrelated to containment systems for releases or spills, "impermeable" should be removed from this definition and defined separately, if necessary.

and 2.47 (emphasis added). To the extent that one or more of these definitions is retained, therefore, the phrase "and associated piping" should be deleted to ensure consistency with the statutory definition of "aboveground storage tank."

k. **"Petroleum" [§ 2.48].** The term "petroleum" does not appear to be used anywhere in the Proposed Rule, so it should be deleted from the Definitions section of the Proposed Rule.

l. **"Release Detection" [§ 2.53].** As an initial matter, WVONGA notes that the term "interstitial space" in this definition should be replaced with "interstice" since "interstice" is the relevant defined term at Section 2.32. Furthermore, there is also the potential for overlap and confusion between the terms "leak detection" and "release detection." For example, the definition of "interstice" refers to "leak detection," while the definition of interstitial monitoring" refers to "release detection." For clarity, therefore, WVONGA recommends using just one of these terms throughout the regulation (or, if both terms are retained, then additional clarification is required to distinguish the intended difference between them).

m. **"Release Prevention Barrier" [§ 2.54].** For purposes of clarification, WVONGA suggests the following revision to this definition: "'Release prevention barrier' means a barricade such as steel bottoms, synthetic materials, clay liners or concrete pads placed in the bottom of or under a tank, which has the function of preventing the escape <u>into the environment</u> of released material and channeling the released material for leak detection."

n. **"Sufficiently Impervious" [§ 2.62].** As WVONGA commented above with regard to the definition of "impervious" (§ 2.27), nothing in the AST Act requires or even

suggests the need for a quantitative standard. As such, this definition should be revised to read as follows: "'Sufficiently impervious' means a material or structure of enough thickness, density, and composition that it will prevent the discharge of fluids to the ~~lands or~~ waters of the State or to soil outside of containment for a period of time sufficient to allow removal and disposal of the discharged material, but in no case would that time be less than seventy-two (72) hours ~~or a material or structure that has a permeability of less than 1 x 10^{-6} cm/sec~~."

o. **"Temporarily Out of Service" [§ 2.64].** An AST is "temporarily out of service" ("TOS") if it is "not currently in use receiving or dispensing fluid" for a period of 180 days, even if the tank may still contain material. § 2.64. WVONGA objects to the notion that an AST that is kept in use storing a substance for more than 180 days should suddenly be considered "temporarily out of service." Just because a tank is being used for storage does not mean that the tank is not in active use, nor does it mean that the AST should suddenly be considered unfit to hold fluids. *See also* WVONGA's comments on Section 11.2, below.

8. **Registration Requirements [§ 3.1]**

a. **Nonoperational Tanks.** The Proposed Rule requires that "[e]very owner of an aboveground storage tank shall register each AST located in West Virginia, regardless of its operational state, **except that permanently out of service tanks are not required to be registered**." § 3.1 (emphasis supplied). While WVONGA agrees that registration is unnecessary for ASTs that are permanently out of service at the time of the registration deadline, the same should apply to nonoperational storage tanks—"empty aboveground storage tank[s] in which fluids will not be deposited or from

which fluids will not be dispensed on or after the effective date of [the AST Act]." W. Va. Code § 22-30-3(4). *See* § 1.5.c (providing that nonoperational tanks are not subject to Sections 5, 8, 9 and 10 of the Proposed Rule). Nonoperational storage tanks should not be required to be registered because they have not contained fluids since June 12, 2015, nor will they contain fluids as long as they retain the nonoperational status.

b. Compartmented and Manifolded Tanks [§§ 3.1.a, 3.1.b]. The Proposed Rule states that, in the case of compartmented and manifolded tanks, the total capacity of all compartments should be considered when evaluating whether the 1,320 gallon threshold is triggered for purposes of evaluating the applicability of the "aboveground storage tank" definition. §§ 3.1.a, 3.1.b. This blanket approach is flatly inconsistent with the definition of "aboveground storage tank" in W. Va. Code § 22-30-3(1) to the extent that a "point of isolation" exists between two tank compartments or manifolded tanks. If a point of isolation exists, then aggregation of tank volume is inappropriate. Accordingly, Sections 3.1.a and 3.1.b should be modified to include a qualifier that the total volume of compartmented or manifolded tanks should not be considered cumulatively in the event that a point of isolation exists to separate the compartments or manifolded tanks into individual "tanks." For manifolded tanks, proposed Section 3.1.b does include the qualifier "unless the tanks are connected in a manner that prevents fluids flowing from one tank to another under any condition," but that is not clearly the same as recognizing a point of isolation. The "under any condition" wording in the proposed qualifier would seem to preclude any practical application of the qualifier because manifolded tanks, by design, are typically manifolded together by

piping and valves to allow for flow between the tanks under open valve conditions, but those valves also represent points of isolation. *See* W. Va. Code § 22-30-3(3).

c. **Scope of Certificate to Operate Requirement [§ 3.1.c.2].** With regard to AST transfers, Section 3.1.c.2 provides that "fluids may not be placed in the tank and the tank may not be operated until the tank is properly registered in the new tank owner's name, the registration fee has been paid, and a certificate to operate has been issued to the new tank owner for the AST." While WVONGA has significant concerns regarding the potential for operational disruption associated with this requirement (see discussion below), we also note that Certificates to Operate are not required for every AST. The requirements in the Proposed Rule relating to the issuance of Certificates to Operate derive from Section 5 of the AST Act, which is limited in its applicability to regulated ASTs only. *See* W. Va. Code § 22-30-5(b)(8).

d. **Change in Regulated/Non-regulated Status [§ 3.1.d.3].** The example provided in Proposed 3.1.d.3 of changing from regulated to non-regulated status—"i.e. changing the container's use from being a storage tank to a process vessel"—is not consistent with the "regulated/non-regulated" terminology established under the AST Act itself because a process vessel is not an AST at all. A regulated AST is defined as either a Level 1 or Level 2 regulated tank [§W. Va. Code § 22-30-3(15)], and so it follows that a non-regulated AST for purposes of this rule is an AST that is not a Level 1 or Level 2 tank, which is not relevant to a process vessel. Section 3.1.d.3 should be revised to read "Change in use of a storage tank to or from the statutory definition of an AST, i.e., changing the container's use from being a storage tank to a process vessel." If there is also an intent to require an amended registration for changing the status of a tank from

regulated (as that term is defined) vs non-regulated, then that should be written separately, such as "Change in the classification of an AST to or from a regulated AST." No example is needed, as the definition of the term is clear.

e. **Change in Tank Contents [§ 3.1.d.4].** Section 3.1.d.4 of the Proposed Rule would require the tank owner to submit an amended registration in the event of a "[c]hange in [the] substance or substances stored in the tank. Changes in formulations (such as changing grades of gasoline, seasonal variations in formulations, minor fluctuations in concentrations, etc.) that would not substantially change the response actions for releases would not be considered a change in substance." For clarity, WVONGA suggests that the agency revise the section as follows: "Substantive ~~C~~change in the substance or substances stored in the tank. Changes in formulations (such as changing grades of gasoline, seasonal variations in formulations, minor fluctuations in concentrations, etc.) that would not substantially change the response actions for releases would not be considered a substantive change in ~~substance~~the contents of a tank." This revision would also render this section consistent with the definition of "change in service," which includes a "substantive change in contents." § 2.9.

9. Notification of Installation [§ 3.4]

Section 3.4 of the Proposed Rule requires the owner of a regulated AST to submit to WVDEP a notification of installation at least 30 days prior to commencing installation of the AST. The basis and rationale for this requirement are unclear. The Proposed Rule establishes various standards and requirements for the construction of new regulated ASTs—with which the tank owner must comply, and which WVDEP can enforce in the event of any failure to comply—and the tank owner must register any new AST prior to its use. There is simply no need to create yet

another step of agency oversight in this process, and therefore this section—and all corresponding provisions referencing an installation application[2]—should be deleted in its entirety. To the extent that a notification requirement is retained, however, the Proposed Rule provides no fixed timetable for the agency to respond, nor does it expressly state that the tank owner may proceed with installation if the 30-day window expires without any response from WVDEP. At a minimum, the tank owner should be authorized to proceed with tank installation if WVDEP fails to provide any response within the 30-day period.

10. Certificates to Operate [§ 4.1]

a. Scope of Requirements [§ 4.1]. The requirements of Section 4.1 of the Proposed Rule relating to the issuance of Certificates to Operate derive from Section 5 of the AST Act, which is limited in its applicability to regulated ASTs. *See* W. Va. Code § 22-30-5(b)(8). The language in Section 4.1 of the Proposed Rule includes no such limitation, however. WVONGA requests that the language of Section 4.1 be revised to clearly limit the application of the provisions to regulated ASTs.

b. Timing Concerns [§ 4.1]. Section 4 of the Proposed Rule does not prescribe any timeframe for the issuance of certificates to operate by WVDEP. The requirement to wait for the issuance of a certificate to operate has the potential to be extremely problematic. For example, the Proposed Rule would prohibit the operation of a new tank (i.e., placed into service after July 1, 2015) until that tank has been registered and the appropriate fee has been paid. § 3.1.c. Section 3.1.c.2 establishes a 30-day window following installation for the submittal of this registration for new tanks, and then goes on to state that, in the transfer context, a tank cannot be operated until the registration is submitted, the applicable fees are paid, **and a certificate to operate is**

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[2] *See, e.g.*, § 4.3.c (referencing WVDEP's approval of an installation application).

issued to the new owner. Combining requirements for the operation of new tanks and transferred tanks within the very same subdivision is extremely confusing. Does the agency intend to require the issuance of a certificate to operate for all new tanks before those tanks can be operated? If not, WVONGA suggests restructuring this section for clarity. If so, WVONGA would object. For oil and gas operations, this may result in delays in placing well pads into production if all necessary approvals have not been received from WVDEP in a timely fashion, despite the fact that a registration has been submitted by the operator in accordance with the statutory and regulatory requirements. This is also extremely problematic in the transfer context. As noted, Section 3.1.c.2 of the Proposed Rule requires registration within 30 days after acquisition of an ownership interest in an AST. A new or amended certificate to operate will be issued by WVDEP based on this registration. However, the Proposed Rule states that, unless otherwise authorized by the WVDEP in writing, fluids may not be placed in an AST until "the tank is properly registered in the new tank owner's name, the registration fee has been paid, and a certificate to operate has been issued to the new tank owner for the AST." § 3.1.c.2. Section 3.6.b also states that "[t]he new owner shall not operate the AST until it is properly registered with the new owner's information, the appropriate fees have been paid if due, and a certificate to operate has been issued to the new owner of the AST." Requiring AST owners and operators to suspend the use of tanks (and empty them?) for an indeterminate period is unreasonable and infeasible, particularly where the use of an AST is critical to the operations of the new owner or operator. These provisions will only unnecessarily complicate transfers of ownership, without any meaningful environmental benefit.

11. **Amendment of Site-Specific Plans [§ 4.2]**

a. **Scope of Requirements [§ 4.2].** The language of Section 4.2 of the Proposed Rule does not clearly and consistently state that the applicability of this section is limited to regulated ASTs, consistent with W. Va. Code § 22-6A-5(c). Accordingly, WVONGA requests that Section 4.2 be revised to expressly limit the application of these provisions to regulated ASTs only (perhaps in the bolded text of the subsection heading).

b. **Acceptable Permits and Plans [§ 4.2.a].** For purposes of clarity, WVONGA suggests that the introductory language of Section 4.2.a be revised as follows: "For those entities subject to site-specific permits and plans <u>issued under Chapter 22 of the West Virginia Code</u>, ..."

c. **Effect of Permit or Plan Amendment [§ 4.2].** The AST Act provides that, "[f]or those entities that are otherwise regulated under those provisions of this chapter that necessitate individual, site-specific permits or plans that require appropriate containment and diversionary structures or equipment to prevent discharged or released materials from reaching the waters of the state, [WVDEP] may amend those permits or plans associated with those permits or both at the request of the permittee to include conditions pertaining to the management and control of regulated tanks, so long as those conditions . . . are sufficient in combination with practices and protections already in place to protect waters of the state . . . ." W. Va. Code § 22-30-5(c). Furthermore, "[a]ny entity whose permit or plan modification or amendment relating to tank integrity and secondary containment design[,] operation and maintenance is approved . . . and so maintained shall be deemed to be compliant with [the AST Act]

and entitles the entity to a certificate to operate so long as the registration requirements of [W. Va. Code § 22-30-4] are also met." *Id.* § 22-40-5(d). The Proposed Rule states that "[u]ntil such time that these permits or plans are amended and finalized, all requirements of the AST Act and its Rules are applicable." § 4.2.a. Thus, it is WVONGA's understanding of this language and the relevant statutory provisions that the requirements contained in any approved permit or plan amendment will supersede the substantive standards of the Proposed Rule (other than registration and requirements relating to corrective action) with regard to the facility that is the subject of the amended permit or plan. However, there are many sections of the Proposed Rule that generally reference compliance with the requirements of "this Rule" without acknowledging that a facility may be subject to an approved permit or plan that has been modified to include site-specific requirements for ASTs. *See, e.g.,* § 5.2.a (requiring certification that each AST and its associated secondary containment structure meet the "standards established in this Rule"). Accordingly, WVONGA encourages WVDEP to conduct a careful review of the Proposed Rule to ensure that appropriate qualifying language is included in recognition of the alternative compliance option provided by W. Va. Code § 22-30-5(c). Otherwise, the Proposed Rule becomes confusing and internally contradictory with respect to what requirements are applicable to those tanks subject to an amended permit or plan.

d. **Reference to API 653 Standards [§ 4.2.a.2.B].** Section 4.2.a.2.B would require an applicant seeking to amend a site-specific permit or plan to include a "statement indicating which industry standards (API 653 Standards for Tank Inspection, Repair, Alteration and Reconstruction) will be followed." As currently drafted, therefore, it

would appear that API 653 is the only industry standard which must be considered or consulted. Accordingly, WVONGA suggests the following revision to this provision: "A statement indicating which industry standards (including, but not limited to API 653 Standards for Tank Inspection, Repair, Alteration and Reconstruction) will be followed."

e. **Interpretation of Referenced Standards [§ 4.2.a.2.B].** In evaluating applications to amend a site-specific permit or plan to include requirements relating to ASTs, the Proposed Rule states that WVDEP "will interpret [references to industry standards] to mean that the permittee adheres to all recommendations and requirements within the standard, such that the terms 'should,' 'may,' 'recommends,' etc. will have the same meaning as 'shall' within the standard." § 4.2.a.2.B. While full adherence to an industry standard generally will be appropriate, WVONGA suggests that the agency retain some discretion in certain instances to allow a tank owner to deviate from a certain standard on a case-by-case basis if such deviation is determined to be necessary—for example, if an applicant wishes to follow a more protective standard.

12. Compliance with Requirements of State Fire Marshal [§§ 4.3.a, 8.3.a]

Several sections of the Proposed Rule require a tank owner to comply with requirements of the State Fire Marshal and the local jurisdiction with regard to ASTs storing combustible or flammable liquids. §§ 4.3.a, 8.3.a. Such requirements are independently applicable and enforceable; there is simply no need to duplicate them in the Proposed Rule. As such, these provisions should be deleted.

13. Tank Spacing [§ 4.3.b]

The Proposed Rule would require new regulated ASTs for which visual methods alone will be used for leak detection "must have a minimum spacing of not less than three (3) feet between tanks and between tanks and dike or vault walls." § 4.3.b. WVONGA notes that many tanks may not be manufactured in a way that would be compliant with this spacing limitation. For example, some smaller ASTs are manufactured with a secondary containment dike attached, with a space of less than three feet between the tank and the dike wall. Such spacing is still adequate to determine leakage and does not interfere with visual inspections. WVONGA accordingly suggests that the Proposed Rule be revised to mandate a sufficiently unobstructed view to determine leakage, without specifying a blanket minimum spacing requirement that may not be appropriate in all circumstances.

14. Karst Topography [§ 4.3.c.2]

Among the siting requirements for new regulated ASTs are additional requirements for new facilities to be located in "karst topography." § 4.3.c.2. This term is not defined in the Proposed Rule, and WVONGA questions whether areas of karst topography have been sufficiently identified—and that such information is readily available—such that tank owners can easily comply with these requirements.

15. Routine Maintenance Inspections [§ 5.1]

Section 5.1 requires the tank owner or operator to "establish and implement routine inspections of conditions at each storage tank facility with regulated ASTs." § 5.1. This language is overbroad to the extent that it encompasses the entire facility at which the regulated AST is located. WVONGA suggests that this provision be reworded as follows: "The owner or operator

shall establish and implement routine inspections of the conditions ~~at~~of each ~~storage tank facility with~~ regulated ASTs~~s~~."

16. Malfunctioning Equipment Repairs, Replacement, or Removal from Service [§ 5.1.b.6.B]

In the first sentence of Section 5.1.b.6.B, the language "immediately as possible" should be replaced either with "in a timely manner" (which is consistent with the wording in Section 5.1.b.6.C for imminent threats) or with "as soon as practicable." Such a change would create a more reasonable timeframe, particularly given that the repair/replacement/removal would still have to be accomplished within a timeframe "in order to prevent releases" in accordance with the language at the end of the sentence.[3]

17. Inspection and Certification [§ 5.2]

a. Scope of Requirements [§ 5.2.a]. As drafted, Section 5.2.a would require "owners or operators of an existing aboveground storage tank [to] submit a certification that each regulated AST and its associated secondary containment structure have been evaluated by a qualified individual . . . ." For clarity and consistency with the statute, WVONGA suggests revising this language as follows: "the owners or operators of an existing regulated aboveground storage tank shall submit a certification that ~~each~~ such regulated AST and its associated secondary containment . . . ."

b. Confusing Terminology. The language of Section 5.2 of the Proposed Rule relating to inspections and certifications is confusing and inconsistent with the AST Act, largely due to the references to "certification" in multiple contexts. Under the AST Act, each regulated AST and its associated secondary containment "shall be **evaluated** by a qualified registered [PE] or a qualified person working under the direct

[3] However, if the current language is retained, it should be revised to state "as immediately as possible."

supervision of a registered [PE], regulated and licensed by the State Board of Registration for Professional Engineers, or by an individual certified to perform tank inspections by the American Petroleum Institute or the Steel Tank Institute, or by a person holding certification under another program approved by [WVDEP.]" W. Va. Code § 22-30-6(a) (emphasis supplied). Thus, this "evaluation" (i.e., inspection) of each regulated AST must be performed by one of the qualified individuals specified in the statute. With regard to the **certification** that such an evaluation (i.e., inspection) has been performed, however, the appropriate form may be submitted by (1) any person who performs the tank evaluation/inspection in accordance with W. Va. Code § 22-30-6(a); (2) a responsible person designated by the owner or operator of the regulated AST; or (3) any other person designated by WVDEP by legislative rule. *Id.* § 22-30-6(d). The initial evaluation and certification must be performed within 180 days of the effective date of rules establishing applicable standards, with subsequent certifications due at regular intervals thereafter but not more frequently than once per year. *Id.* § 22-30-6(c).

In accordance with these statutory requirements, the Proposed Rule would require subsequent inspections and certifications every third year after the initial inspection for Level 1 ASTs and every fifth year after the initial inspection for Level 2 ASTs. §§ 5.2.b.1, 5.2.b.2. However, these provisions become confusing when WVDEP appears to mandate "certification" by one of the qualified individuals that must perform the inspection. This confusing terminology occurs throughout this

section. *See, e.g.*, §§ 5.2.b.1, 5.2.b.2, 5.2.b.3. For clarity, therefore, WVONGA strongly encourages the following revisions:[4]

- **§ 5.2.b.1:** "For Level 1 AST systems subject to this Rule, the initial inspection under this Rule and subsequent inspections every third year thereafter shall be ~~certified~~performed by a Professional Engineer (PE) . . ."

- **§ 5.2.b.2:** "For Level 2 AST systems subject to this Rule, the initial inspection under this Rule and subsequent inspections every fifth year thereafter shall be ~~certified~~performed by a PE . . ."

- **§ 5.2.b.3:** "For both Level 1 and Level 2 AST systems subject to this Rule, the tank owner or operator shall ~~certify~~perform annual inspections in intervening years between the PE, API or STI inspections ~~and certifications~~, unless the tank in the intervening years is inspected by a PE, API or STI certified inspector ~~who certifies the tank~~. In intervening years, ~~The inspection certification performed by~~ the tank owner or operator will not be required to certify tank integrity, but must certify whether or not any obvious change occurred to the AST system in that intervening years between ~~certifications~~inspections performed by a PE API or STI certified inspector."

- **§ 5.2.c:** "In ~~certifying~~evaluating a regulated AST system, the ~~certifying~~inspecting person shall, at a minimum, review all of the following items for each AST system . . ."

c. Reference to Interpretive Rule [§ 5.2.b.2]. Section 5.2.b.2 includes a qualifier that "any Level 2 AST properly certified by a PE, an API certified inspector or a STI certified inspector under the Interpretive Rule (47 CSR 62) will be considered to have met the initial inspection criteria under this Rule." While WVONGA agrees with this approach, we suggest that the word "properly" be deleted from this provision, as the Interpretive Rule did not require inspection of Level 2 ASTs—which were defined differently than Level 2 ASTs under the amended AST Act and Proposed Rule—by a

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[4] While WVONGA has attempted to bring as many sections as possible to the agency's attention through these comments, this confusing terminology occurs throughout the Proposed Rule. Accordingly, WVONGA urges WVDEP to undertake a comprehensive review of the Proposed Rule to ensure that corresponding clarifications are made throughout.

PE, API-certified inspector or STI-certified inspector, but also authorized inspection by the owner of the tank. *See* 47 C.S.R. 62-3.2.

d. **Annual Certifications [§ 5.2.b.4].** As drafted, Section 5.2.b.4 requires that, following the initial inspection, inspection certifications for subsequent years must be submitted "on January 1 of each year thereafter." Given that January 1 is typically either a recognized holiday or a weekend, it makes no sense that the submissions would have to occur "on" that date. The timing requirement for these annual certifications should be revised to read "on or before January 1 of each year thereafter."

e. **Inspections in Intermediate Years [§ 5.2.b.5].** Section 5.2.b.5 of the Proposed Rule appears to relate very closely to Section 5.2.b.3. For clarity, WVONGA suggests combining this provision—which essentially states that qualified representatives of the owner or operator of a regulated AST may perform inspections in intervening years—with Section 5.2.b.3.

f. **Fit for Service vs. Not Fit for Service [§§ 5.2.b.5.A, 5.2.b.5.B, 5.2.b.5.C, 5.2.b.5.D].** The referenced sections require the "applicable certifying person" to complete and sign a Fit for Service form when "the regulated AST system meets the minimum standards established by this Rule" and to complete a Not Fit for Service form when "the regulated AST system does not meet the minimum standards established by this Rule." 5.2.b.5.A, 5.2.b.5.C. First, because these provisions appear as subparagraphs of Section 5.2.b.5, which relates to inspections during intervening years, it is unclear whether these forms are to be submitted every year (i.e., including intervening years) or every third/fifth year when the "formal" inspection occurs. Second, if the tank owner or operator is required to complete this form during intervening years, then how does

this obligation to determine whether "the AST system meets the minimum standards established by this Rule" align with the language of Section 5.2.b.3 stating that the owner or operator does not have to certify tank integrity during "off-year" inspections? Third, WVONGA assumes—but requests confirmation from WVDEP—that the Fit for Service and Not Fit for Service designations are intended to take into account the various deadlines for compliance contained throughout the Rule, or any alternative requirements contained in an approved permit or plan. Additionally, WVONGA notes that because ASTs determined to be Fit for Service may also have deficiencies noted, it does not appear that any failure to meet the requirements of the Proposed Rule will render an AST unfit for service (nor should it). The language of the Proposed Rule is unclear on this point, however. Accordingly, WVONGA suggests that WVDEP include language clarifying that an AST should be deemed Not Fit for Service when there is an imminent threat of a release or there is some significant concern regarding tank integrity.

18. Internal Inspections [§ 5.3.b]

a. **Exceptions [§ 5.3.b.1.C].** The Proposed Rule establishes a schedule for performing formal internal inspections of new regulated ASTs, and then lists various alternative circumstances for which an exception will be granted. It appears that the word "or" should be included at the end of Section 5.3.b.1.C.

b. **Existing Regulated ASTs [§ 5.3.f].** Section 5.3.f establishes requirements for internal inspection of existing regulated ASTs if an AST "has not had an internal inspection." Does this also include ASTs that have not had an internal inspection meeting the requirements of Section 5.3.e?

19. Spill Prevention Response Plans [§ 5.5]

a. Submission Deadline [§ 5.5.a]. Section 5.5.a requires owners and operators of existing regulated ASTs to submit a Spill Prevention Response ("SPR") Plan by December 9, 2015. WVONGA requests confirmation that a tank owner or operator that properly submitted a plan in December 2014 in accordance with the Interpretive Rule does not need to resubmit a plan in advance of this 2015 deadline unless some change has occurred that would require amendment.

b. Limitation on Alternative Plans [§ 5.5.b.1.D]. Although the language of Section 5.5.b.1.D is somewhat confusing, it appears that a tank owner or operator that seeks to amend a site-specific Groundwater Protection Plan ("GPP") or SPCC Plan to include conditions pertaining to the management of regulated ASTs and the prevention of releases in accordance with W. Va. Code § 22-30-5(c) and Section 4.2 of the Proposed Rule cannot also certify to the existence of those plans in lieu of submitting an SPR Plan. This prohibition makes little sense and, significantly, is not supported by the language of the AST Act, which clearly allows for a GPP or SPCC Plan in lieu of an SPR Plan, with no conditions equivalent to the proposed limitations in Section 5.5.b.1.D. *See* W. Va. Code § 22-30-9(d). An amendment to these plans expressly relating to ASTs should not disqualify them from serving as alternative SPR Plans for purposes of Section 5.5. As such, proposed Section 5.5.b.1.D should deleted entirely.[5]

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[5] If this section is not deleted, it should be revised to read as follows: "If the tank owner or operator is seeking to have its site-specific permits or plans amended to include conditions pertaining to the management and control of regulated tanks under subsection 4.2 of this Rule, then the tank owner or operator must ~~submit documentation required by subsection 4.2 of this Rule~~ disclose that information as part of the certification to the Secretary under ~~and cannot certify the plan as described in~~ paragraph 5.5.b.1 of this Rule."

c. **Reportable Releases [§ 5.5.e].** Section 5.5.e refers to an obligation to immediately report any "reportable release" from an AST to WVDEP's emergency notification number, but the term "reportable release" is not clearly defined. For consistency with Section 6.2.a, WVONGA requests that the wording "reportable release" be replaced with "confirmed release" to avoid any confusion or discrepancy between the immediate reporting requirements of Section 6.2 and the immediate reporting requirement referenced here.

20. Tank Signage [§ 5.6]

The AST Act requires each AST to "display, or have displayed nearby, the tank registration number, when issued by [WVDEP]; the emergency contact number for the owner or operator of the tank; and the number for [WVDEP's] Spill Reporting Hotline." W. Va. Code § 22-30-11. This requirement became effective on June 12, 2015—the effective date of the statute. The Proposed Rule now would establish a number of very specific additional requirements relating to minimum lettering size, minimum sign size (if used), visibility, legibility, color and sign height that would become effective well after most tank owners have purchased and installed their signs. *See* § 5.6.b. Accordingly, WVONGA strongly urges that the agency limit the applicability of this section to signs installed after the effective date of the Final Rule, while reserving the right to require any sign installed prior to the effective date of the Final Rule to be replaced if the agency determines that it is not sufficiently legible or visible.

21. Reporting and Recordkeeping

a. **Leak Detection Records [§ 6.1.a.2].** Section 6.1.a.2 requires that, "[a]t a minimum, twelve (12) continuous[6] months of leak detection records must be maintained at the

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[6] Here and elsewhere throughout the Proposed Rule, reference is made to "continuous months" rather than "consecutive months." *See also* §§ 5.1.a.4, 5.1.b.5, 6.1.a.5, 10.3.*l*.

facility and readily available for review." This appears to conflict with Section 6.1.b, which provides the option of maintaining records at "a readily available alternative site"—particularly important in the case of unmanned facilities.[7] WVONGA suggests that the reference to the location of the leak detection records be deleted entirely from Section 6.1.a.2, in favor of the language in Section 6.1.b.

b. **Document Retention [§§ 6.1.a.6, 6.1.a.7, 6.1.a.8].** These sections require the tank owner or operator to maintain certain documentation, but do not specify how long they should be retained.

c. **Original Installation and Manufacturer's Records [§§ 6.1.a.9, 6.1.a.11].** For existing tanks, the records related to original installation or various manufacturer's documentation, instructions, or other information may no longer be available. As such, language should be added to these sections to clarify that, for **existing** tanks, only those records actually available to the owner/operator as of the effective date of the Rule will be required.

22. Notification of Confirmed Release [§ 6.2.a]

Section 6.2.a would require the owner or operator of an AST to immediately notify "the county or municipal emergency management agencies" and WVDEP's Spill Hotline upon the occurrence of a confirmed release. First, this section fails to specify exactly which county or municipal authorities the tank owner must contact.[8] Second, such contacts may be inappropriate given the nature of the spill at issue—particularly where "release" encompasses **any** escape of

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[7] For example, unmanned wellpads with only a mailbox to store information. This would also limit the ability of the tank operator to conduct leak detection inspections and document the same in electronic systems.

[8] Presumably, this would be consistent with the "county or municipal emergency management agencies" identified in the SPR Plan pursuant to Section 5.5.c.5, but this is not stated explicitly.

fluids from secondary containment, no matter how minor in nature. WVONGA suggests that the notification obligation be limited to Spill Hotline, which would determine what emergency responders, if any, should be contacted.

Further, WVONGA reiterates its comment above regarding the adoption of a minimum threshold before the extensive notification and remediation requirements of the Proposed Rule attach. Indeed, many local authorities may not want to receive a notification of every minor spill that does not have the potential to reach waters of the State and can be cleaned up promptly without any environmental concern. Accordingly, WVONGA urges the adoption of reportable quantities that would trigger the release remediation procedures under the rule (e.g., any reportable quantity established by federal law, or any release that could reach a water of the state).

23. Corrective Action

a. Minimum Threshold [§ 7]. This section imposes extensive release response procedures that are simply overly burdensome in the context of minor releases. Accordingly, WVONGA reiterates its comment above regarding the adoption of a minimum threshold before the extensive notification and remediation requirements of the Proposed Rule attach. Minor spills at wellpads that are immediately cleaned up and the soil excavated should not be subject to a prescriptive investigation and cleanup process that will provide little to no additional environmental protection. WVONGA is also concerned regarding WVDEP's capacity to review and approve all the reports that would be generated by requiring this process for **any** spill outside of secondary containment. WVONGA therefore urges the adoption of reportable quantities that would trigger the release remediation procedures under the rule (e.g., any reportable quantity established by federal law, or any release that could reach a water of the state).

b. **Threatened Releases [§ 7.1].** The requirements in Sections 6 and 7 of the Proposed Rule relating to releases and corrective action are confusing in the context of "threatened releases." For example, Section 7.1 establishes mandatory requirements to be undertaken "in response to any confirmed release or threatened release from an AST." However, if a threatened release was discovered and addressed pursuant to an investigation under Section 6.3, presumably the requirements of Section 7 (which otherwise appear to apply only to confirmed—i.e., actual—releases) would not apply. If this is the agency's intent, perhaps the clearest approach would be to delete the "or threatened release" language from Section 7.1.

c. **Return to Service of a Faulty AST [§ 7.2.a.1].** Presumably, Section 7 applies to all ASTs and not just regulated ASTs, but the requirement in Section 7.2.a.1 that a faulty AST cannot be returned to service until it is certified as meeting the Fit for Service requirements in Section 5.2 (which only applies to regulated ASTs) creates uncertainty as to whether this provision is required only for regulated ASTs that would otherwise be subject to Section 5.2, or whether, for purposes of this Section 7.2.a.1, the Section 5.2 requirements are intended to apply to all faulty ASTs (regardless of whether or not they are "regulated tanks"). This should be clarified.

d. **NAPL Conceptual Site Model Requirement [§ 7.2.a.6].** The requirement to "formulate a NAPL Conceptual Site Model (NCSM)[9] to determine the most efficient and environmentally protective remedial approach for addressing the release" is overkill for relatively small releases that are required to be responded to promptly. As drafted, this would require development of a full NCSM even for very small releases of NAPL (e.g., one gallon of oil or condensate), which simply need to be cleaned up. The

[9] This is an undefined term.

reference to, and requirement for, a NAPL NCSM should be removed entirely from Section 7.2.a.6, given that Section 7.4.b.4 separately, and more adequately, requires the site characterization to include "as necessary, based on the nature, extent, type, volume or complexity of the release . . . a conceptual site model . . . ." Accordingly, Section 7.2.a.6 should be revised as follows: "If non-aqueous phase liquids (NAPL) are present, ~~owners or operators shall formulate a NAPL Conceptual Site Model (NCSM) to determine the most efficient and environmentally protective remedial approach for addressing the release.~~the NAPL shall be removed and remediated to the maximum extent practicable."

e. **Regulated Substance [§ 7.2.a.8, 7.2.a.8.B].** The term "regulated substance" used in Sections 7.2.a.8 and 7.2.a.8.B is not defined and creates confusion as to what it is intended to mean. If this term is intended to mean only certain substances, that needs to be clarified; otherwise, if it is intended to mean any substance released from an AST subject to the Proposed Rule, then the word "regulated" should be deleted.

f. **Restoration/Replacement of Water Supplies [§ 7.3.b.3].** Section 7.3.b.3 reads "When owners or operators restore or replace an affected or diminished water supply by providing access to a public water system, the owners or operators will not be required to pay for the quantity of water supplied to existing customers of the public water system being replaced." However, the intent/meaning of this sentence is not clear. It begins with a reference to any water supply (presumably public or private) being restored or replaced, but then ends with a reference "the public water system being replaced," which seems inconsistent. Is the intent here to say that the owner or operator will not be required to pay for the quantity of water supplied to existing

customers of the public water system to which the access is being provided? If so, WVONGA agrees with that provision and suggests revising the sentence to read: "When owners or operators restore or replace an affected or diminished water supply by providing access to a public water system, the owners or operators will not be required to pay for the quantity of water supplied to existing customers of the public water system to which access is being provided ~~replaced~~,"

g. **Site Closure/No Further Action Request [§ 7.4.g].** In Section 7.4.g, it appears that the reference to "subsection 7.8" is intended to refer to "subsection 7.7," which relates to No Further Action requests.

h. **Corrective Action Plan [§ 7.5.e].** Is the "Corrective Action Plan" ("CAP") referenced in Section 7.5.e the same as the "corrective action work plan" referenced in Section 7.4.f? If so, the Rule should use consistent terminology; if not, more distinguishing terms should be used to avoid confusion. Further, Section 7.5.e mandates the submittal of a CAP, whereas Section 7.4.f appears to require the submittal of corrective action work plans "requested by the Secretary." Finally, Section 7.5.e.1 requires the submittal of a CAP within 90 days of the approval of a site characterization report, or within an alternative timeframe approved by WVDEP. However, Section 7.5.a allows the owner or operator to skip the site characterization investigation (including the site characterization report) if the owner or operator chooses to submit a CAP.[10] Notwithstanding the circularity of these provisions, WVONGA assumes that, if the tank owner proceeds directly to the preparation of a CAP, the deadline for its submittal would always be on a case-by-case "alternative timeframe approved by WVDEP"?

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[10] Similarly, the CAP must include "[a] brief summary of the site characterization report conclusions." § 7.5.e.1.A. For clarity, WVONGA suggests adding "if applicable" or "to the extent such a report was prepared" as a qualifier to this provision.

i. **Remedial Action Progress Reports [§ 7.5.g].** Despite being titled "remedial action progress reports," this section repeatedly references "corrective action progress reports." Consistent terminology should be implemented.

j. **Onsite Storage of Contaminated Soil [§ 7.6].** This section prohibits the onsite storage of contaminated soil unless a "brief written plan" is submitted to WVDEP. The Proposed Rule is vague, however, on whether and when these plans will be approved by the agency. This is not practical in the context of spill cleanup operations. Contaminated soil must be sampled and analyzed by a certified laboratory, a waste profile must be submitted for the landfill to accept the waste, and the waste profile must be approved prior to the landfill accepting this waste. This process can take several weeks and during that time, the soil would need to be stockpiled on location. Landfills currently do not have the storage capacity to store contaminated soil in their storage locations while awaiting the completion of all of these steps. Accordingly, although the Proposed Rule outlines a process for the approval of onsite storage, it does not appear that WVDEP understands how often this will be necessary for cleanup or the number of requests/written plans that ultimately will be submitted. In lieu of requiring a plan submittal for onsite storage of contaminated soil, WVDEP instead should outlined any necessary requirements for doing so (e.g., lined roll off boxes, tarps, secondary containment).

k. **NAPL Corrective Actions [§ 7.7.a.1.B].** As part of a request for a No Further Action determination, the owner or operator must include "[a] demonstration that NAPL has been addressed in accordance with subsection 7.3." This reference to subsection 7.3 appears to relate to a provision that appeared in earlier iterations of this rulemaking that

has since been deleted. (Section 7.3 now relates to affected or diminished water supplies.)

l. **Typographical Error [§ 7.7.a.1.C].** It appears that the reference to subsection 7.7 in Section 7.7.a.1.C should be to subsection 7.6.

m. **Alternative Corrective Action [§ 7.8.a].** Section 7.8 of the Proposed Rule gives the owner or operator the option to remediate releases from ASTs through the Voluntary Remediation and Redevelopment Program ("VRRP"). If the owner or operator elects to proceed through the VRRP, it must notify WVDEP in writing and submit an application to the VRRP within 30 days of such notification. § 7.8.a. There does not appear to be any deadline for making this notification to WVDEP, however. For clarity, WVONGA also recommends including a specific citation to the Voluntary Remediation and Redevelopment Rule (60 C.S.R. 3), rather than generally referring to the Voluntary Remediation and Redevelopment Act and its "associated legislative rule."

24. AST Design, Construction and Installation [§ 8]

a. **Application to Regulated ASTs.** For clarity regarding the applicability of the various requirements in this section, WVONGA suggests that the title of Section 8 be revised to state "Criteria for Design, Construction and Installation of Regulated ASTs."

b. **Advance Notice of Installation [§ 8.2.f].** The Proposed Rule would require 30-day advance review and approval by WVDEP of construction design criteria and engineering specifications (that have already been approved by a professional engineer or API-or STI-certified person). § 8.2.f. As discussed above, these provisions are overly restrictive and unnecessary, as this work already must be undertaken in

accordance with industry standards and the substantive requirements of the Proposed Rule. Adding another layer of regulatory oversight—one that does not appear to be contemplated by the statute itself—will only complicate the process further and create unnecessary operational delays, particularly where there is no timeframe for WVDEP to complete its review. WVONGA urges WVDEP to delete these provisions.

c. **Release Prevention Barriers [§ 8.2.i].** Sections 8.2.i.1 and 8.2.i.4 would require that impervious soil layers, geosynthetic clay liners, and concrete slabs serving as release prevention barriers have permeabilities of 10^{-7} cm/sec or less. As noted previously above, however, nothing in the AST Act requires or even suggests the need for a quantitative permeability standard. The definition of "secondary containment" in the Act simply requires that containment be "sufficiently impervious to contain fluids" and if earthen, the containment must be able to contain the fluid "for a minimum 72 hours." W. Va. Code § 22-30-3(17). Similarly, the definition of "release prevention barrier" contains no quantitative permeability standard, but does require that the barrier be capable of preventing the escape of released material and channeling the released material for leak detection, both of which can be achieved by concrete slabs or engineered impervious soils or clay liners without specifying a maximum 10^{-7} cm/sec permeability standard. As such, the references to the 10^{-7} cm/sec permeability standard are unnecessarily stringent and should be removed from these subsections.

d. **General Upgrade Requirements for Existing AST Systems [§ 8.3].** Section 8.3 requires that upgrades to existing AST systems be performed in accordance with manufacturer's or fabricator's instructions, but for existing ASTs, the manufacturer's

or fabricator's instructions may no longer be available. As such, the qualifier "if available" should be inserted after "manufacturer's or fabricator's instructions."

e. **Reference to Piping [§§ 8.3.b and 8.3.c].** Section 8.3.b provides that "[a]ll existing regulated metallic ASTs and piping in direct contact with soil or other electrolytes which are not equipped with cathodic protection shall be upgraded to meet the requirements of Section 9 of this Rule." A similar reference occurs in Section 8.3.c. The definition of "aboveground storage tank" encompasses piping connected to a tank up to the first point of isolation (and so any specific reference to piping would be redundant); piping beyond the first point of isolation is outside the scope of the AST Act (and so is beyond the scope of this rulemaking). Accordingly, the separate references to piping in Sections 8.3.b and 8.3.c should be deleted.

f. **AST Gauge Requirement [§ 8.3.d].** The Proposed Rule would require all existing regulated ASTs to be upgraded with a "gauge or other measuring device that accurately shows the volume of material being stored in the AST to meet the requirements of subsection 10.1." § 8.3.d. A gauge may not be necessary for every single tank; in some situations, a gauge stick should be sufficient to determine the amount of liquids in the tank.

g. **Aboveground Tank Modifications [§ 8.4].** Section 8.4 requires that modifications to regulated AST systems be performed in accordance with manufacturer's or fabricator's instructions, but for existing ASTs, the manufacturer's or fabricator's instructions may no longer be available. As such, the qualifier "if available" should be inserted after "manufacturer's or fabricator's instructions."

h. **Ancillary Equipment for ASTs [§ 8.6].** Section 8.6 requires that ancillary equipment up to the first point of isolation on regulated AST systems be constructed, designed, installed, and operated in accordance with manufacturer's or fabricator's instructions, but for existing ASTs, the manufacturer's or fabricator's instructions may no longer be available. As such, the qualifier "if available" should be inserted after "manufacturer's or fabricator's instructions."

i. **Valves on Tank Connections [§§ 8.6.d, 8.7.g].** Sections 8.6.d and 8.7.g generally require that tank connections through which fluids/substances can flow be equipped with operating valves near the tank, but the wording and details are not the same in these two sections, which leads to uncertainty regarding the minimum requirements. Either one of these sections should be deleted, or they should be revised to ensure consistency. The provision in Section 8.7.g that the valve requirement is not applicable to a connection that is located at a point higher than the highest liquid level in the AST should also apply at Section 8.6.d.

j. **Annual Tightness Testing [§ 8.7.e].** Section 8.7.e requires annual tightness testing for underground piping. This requirement is excessive and is expected to be extremely difficult to perform. WVONGA requests the deletion of this provision (or, at a minimum, a reduction in the frequency of this testing).

k. **API 570 Testing [§ 8.7.i].** The broad requirement in Section 8.7.1 that all regulated aboveground piping must be "tested" in accordance with the requirements of API 570 appears potentially inconsistent with other subsections of Section 8.7, or at least insufficiently clear with regard to exactly what testing this refers to. For example, Section 8.7.a allows piping to be tested in accordance with a number of different codes

of practice developed by organizations other than API; Section 8.7.e exempts certain double-walled piping from annual tightness tests; and Section 8.7.e.3 refers to API 570 as an alternative to a pressure test, but not a requirement. Accordingly, WVONGA recommends that Section 8.7.i be deleted as unnecessary, given the more specific requirements already contained in Sections 8.7.a through 8.7.h. If Section 8.7.i is retained, more specificity should be included as to exactly what tests are being referenced.

25. Corrosion and Deterioration Prevention [§ 9]

a. Application to Regulated ASTs. For clarity regarding the applicability of the various requirements in this section, WVONGA suggests that the title of Section 9 be revised to state "Criteria for Corrosion and Deterioration Prevention for Regulated ASTs."

26. Release Prevention, Leak Detection and Secondary Containment [§ 10]

a. Application to Regulated ASTs. For clarity regarding the applicability of the various requirements in this section, WVONGA suggests that the title of Section 10 be revised to state "Criteria for Release Prevention Measures, Leak Detection and Secondary Containment for Regulated ASTs."

b. Spills and Overfills [§ 10.1.b]. Section 10.1.b provides that "[t]he owner or operator shall report, investigate, and clean up spills and overfills in accordance with the requirements of sections 6 and 7 of this Rule." As an initial matter, this provision is redundant—there is no need to separately require compliance with the requirements of Section 6 and 7. To the extent that this provision is retained, however, WVONGA requests the addition of clarifying language that the provisions of Sections 6 and 7

apply only to releases or threatened releases outside of secondary containment. A minor spill or overfill into secondary containment may not trigger these requirements.

c. **Secondary Containment Permeability [§ 10.2.f].** This subsection would require that new secondary containment systems for Level 1 ASTs have permeabilities of 10^{-7} cm/sec or less. Once again, nothing in the AST Act requires or even suggests the need for a quantitative permeability standard. The statutory definition of "secondary containment" requires only that containment be "sufficiently impervious to contain fluids" and if earthen, the containment must be able to contain the fluid "for a minimum 72 hours." W. Va. Code § 22-30-3(17). Similarly, Section 10.2.c requires that secondary containment for existing regulated ASTs be "sufficiently impervious to prevent the released substance from penetrating the containment structure until the release can be detected and recovered, but in no case will that time be less than 72 hours," which is generally consistent with the statutory standard, and would be equally adequate and appropriate for new Level 1 ASTs as it is sufficient to prevent any release outside the containment. As such, the reference to the 10^{-7} cm/sec permeability standard in this subsection is unnecessarily stringent and should be removed.

d. **Transfers To or From Regulated ASTs [§ 10.2.g.1.C].** Section 10.2.g.1.C requires that transfers to or from a regulated AST within secondary containment be monitored for the duration of the transfer. The qualifier in Section 10.1.a.1 that an AST at an oil and gas site that is connected directly to a pipeline or a well is not subject to constant monitoring would be equally relevant here, and should be similarly included.

e. **Vegetation [§ 10.2.i.4].** The Proposed Rule would require the area within any dike installed after the effective date of the rule to be kept free of **all** vegetation, debris, and

any other material not necessary to the operation of the facility. § 10.2.i.4. Prohibiting all vegetation in new earthen dikes is unreasonable and likely counterproductive, as the presence of light vegetation provides important erosion and sediment control value without reducing or otherwise adversely impacting the capacity or integrity of the secondary containment structure.

f. **Manufacturer's Specifications for Leak Detection Methods/Equipment [§ 10.3.a].** WVONGA agrees that visual leak detection should be excluded from the requirement in Section 10.3.a to be installed, calibrated, operated, and maintained in accordance with the manufacturer's specifications, as currently proposed. However, it would appear that some of the other acceptable leak detection methods listed in Section 10.3.e should be similarly excluded, as they may be unlikely to have relevant "manufacturer's specifications" (such as statistical inventory reconciliation, soil vapor monitoring, and volumetric or mass measurements). WVDEP should ensure that the requirement in Section 10.3.a to follow manufacturer's specifications only applies to methods for which those specifications exist.

g. **Visual Leak Detection [§ 10.3.c].** WVONGA agrees that the descriptions in Sections 10.3.c.1 and 10.3.c.2 involving double-bottomed or double walled tanks and release prevention barriers that channel fluids to an area for observation are acceptable visual leak detection methods. However, for those methods, the requirement in the introductory paragraph at Section 10.3.c that the AST bottom be "readily accessible for view and properly illuminated" is unnecessary and inappropriate, and should be modified accordingly. If either of the methods described in Sections 10.3.c.1 and 10.3.c.2 is utilized, then the tank bottom itself should not have to be "readily accessible

for view or properly illuminated," as long as the area for observation of any fluids is "readily accessible for view and properly illuminated."

h. **Tightness Testing [§ 10.3.f.1].** The Proposed Rule requires that tank tightness testing be performed by a qualified/certified third-party inspector or technician. § 10.3.f.1. It is unclear why an employee of the tank owner cannot perform this test if (s)he has the appropriate qualifications and/or certification.

i. **Leak Detection Upgrades [§ 10.3.m].** The Proposed Rule would require existing regulated ASTs to be upgraded with appropriate leak detection methods no later than June 30, 2017 for Level 1 ASTs or June 30, 2018 for Level 2 ASTs. In both cases, however, "leak detection by visual means must have begun no later than the effective date of this Rule." §§ 10.3.m.1, 10.3.m.2. WVONGA assumes, and requests clarification from WVDEP, that visual inspection pursuant to this section will be considered acceptable even if all of the conditions set forth in Section 10.3.c are not met for an existing AST upon the effective date of the Rule.

27. Nonoperational ASTs [§ 11.1]

WVONGA is unclear as to why nonoperational ASTs should be addressed in the Proposed Rule. Nonoperational storage tanks are "empty aboveground storage tank[s] in which fluids will not be deposited or from which fluids will not be dispensed on or after the effective date of [the AST Act]." W. Va. Code § 22-30-3(4). Under this definition, an AST is either operational or it is not as of the effective date of the AST Act (June 12, 2015)—if it was ever operational after the statute's effective date, it cannot technically qualify as "nonoperational" thereafter. Thus, the

scenario in Section 11.1.a is impossible. This entire section is unnecessary and should be deleted.[11]

28. Temporarily Out of Service ASTs [§ 11.2]

A tank is "temporarily out of service" ("TOS") if it is "not currently in use receiving or dispensing fluid" for a period of 180 days, even if the tank may still contain material. § 2.64. As an initial matter, WVONGA objects to the notion that an AST that is kept in use storing a substance for more than 180 days should suddenly be considered "temporarily out of service." Just because a tank is being used for storage does not mean that the tank is not in active use, nor does it mean that the AST should suddenly be considered unfit to hold fluids. As currently drafted, the Proposed Rule would require the owner or operator of a TOS tank to empty the tank and "reuse, treat or dispose of the AST system contents in accordance with State and federal requirements."[12] § 11.2.a.3. This requirement is wholly arbitrary and has the potential to create an unnecessary disruption to the operations of the tank owner. As long as the AST is maintained in accordance with the standards required by the Proposed Rule, why should TOS status matter? This is particularly true where the owner or operator of a TOS tank must (1) continue operation and maintenance of the corrosion protection system, (2) perform monthly leak detection if the AST has not been emptied, and (3) perform annual inspections, including certification of AST

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[11] If any this section is retained in any manner, however, the reference to "June 6, 2014" should be changed to "June 12, 2015" consistent with the current statutory definition of a nonoperational tank. WVONGA also notes that the subsection intended to be labeled 11.1.a.2 is incorrectly numbered "13.1.a.2."

[12] If an AST becomes TOS if it does not dispense or receive fluids for 180 days, does the owner or operator have an additional 180 days to complete an amended registration form? § 11.2.a.1. How soon after an AST becomes TOS does the owner or operator have to empty the tank? § 11.2.a.3.

integrity.[13] §§ 11.2.a.2, 11.2.a.4, 11.2.a.5. All of this seems to create an entirely unnecessary administrative burden without any corresponding environmental benefit.

29. Permanent Closure [§ 11.4.a]

In the second sentence of Section 11.4.a, the wording "[a]ll tanks taken out of service" should be changed to either "[a]ll tanks permanently taken out of service" or "[a]ll tanks permanently closed" to avoid any unintended interpretation that this sentence could apply to tanks that are only taken out of service temporarily.

30. Delivery Prohibition [§ 12]

The Proposed Rule prohibits delivery of product to an AST by a product deliverer or transporter unless the owner provides proof of compliance with the requirements for registration, annual fee payment and financial responsibility. § 12.1. Again, this is an overreach of WVDEP's authority under the AST Act. Indeed, the Legislature considered the delivery prohibition concept during the development of the AST Act and similar language was rejected. WVONGA urges WVDEP to delete Section 12.1 in its entirety, and make corresponding revisions to the remainder of Section 12 to remove all references to the delivery prohibition.[14]

31. Financial Responsibility Requirements for ASTs [§ 13]

Section 13 of the Proposed Rule sets out various bonding and financial assurance requirements to ensure that funds will be available for corrective action in the event of a release from an AST. As currently drafted, the financial responsibility requirements attach to the "owner

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[13] Presumably, certifications of AST integrity would continue to be performed on the three- or five-year schedule established in Section 5 of the Proposed Rule, and would not be required annually for TOS tanks.

[14] To the extent that this section is retained, however, WVONGA notes that Section 12.1.b improperly refer to payment of an "annual registration fee." Registration fees are paid once, not annually. Accordingly, the term "annual" should be deleted. If this section is intended to refer to the annual operating and response fees, then the language should be corrected to reflect this. Finally, WVONGA notes that Section 12.2.a contains a reference to subsection 14.1, instead of to subsection 12.1.

or operator." WVONGA urges WVDEP to clarify the party responsible for providing financial assurance in the event that the owner and operator are different entities. Further, WVONGA notes that the oil and gas industry is currently subject to financial assurance requirements under W. Va. Code §§ 22-6-1 *et seq.* and 22-6A-1 *et seq.* Accordingly, WVONGA strongly requests that this existing bonding program—which has been sufficient to address potential concerns relating to releases from ASTs used by the oil and gas industry to date—be accepted as satisfying the financial assurance requirements of the AST Act. Duplicative and burdensome financial assurance requirements are unnecessary. If WVDEP declines to do so, Section 13 should be amended to allow for the use of a blanket bond based upon the total number of tanks in service, consistent with the bonding program under W. Va. Code §§ 22-6-1 *et seq.* and 22-6A-1 *et seq.*[15]

WVONGA also notes that the subsection intended to be 13.1.e is incorrectly labeled as subsection 3.1.e in the Proposed Rule.

Finally, WVONGA notes that Section 13.3.d refers to the financial test and guarantees provided by a corporate parent, sibling, or grandparent, which WVONGA agrees should be considered acceptable forms or demonstrating financial assurance. However, those mechanisms are not included in the list of acceptable mechanisms in Section 13.2. Both the financial test and guarantees provided by a corporate parent, sibling, or grandparent, should be added to the list of acceptable mechanisms in Section 13.2.

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15 *See also* WVONGA's comment above regarding the definition of "facility" and the request to allow financial responsibility determinations to be based on aggregate storage capacity of Level 1 and Level 2 ASTs rather than requiring a $5000 minimum at every location.

West Virginia Oil and Natural Gas Association
Comments Regarding Proposed Legislative Rule 47 C.S.R. 64
"Rules Governing Aboveground Storage Tank Fee Assessment"
July 30, 2015

The West Virginia Oil and Natural Gas Association ("WVONGA") appreciates the opportunity to provide the following comments on the West Virginia Department of Environmental Protection's ("WVDEP") proposed legislative rule 47 C.S.R. 64, entitled "Rules Governing Aboveground Storage Tank Fee Assessments" (the "Proposed Fee Rule"), which was filed with the West Virginia Secretary of State on June 25, 2015. The Proposed Fee Rule would establish the fee structure under the Aboveground Storage Tank Act, W. Va. Code §§ 22-30-1 *et seq.* (the "AST Act"). Chartered in 1915, WVONGA 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 construction, environmental services, drilling, completion, gathering, transporting, distribution 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 80% of the production and 90% of the permits, operate more than 20,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses.

A. Fee Assessment

An informed assessment of the fee structure set forth in the Proposed Fee Rule is rendered difficult due to the very limited information provided by WVDEP in the accompanying Fiscal Note. For example, the Fiscal Note does not include the number of Level 1 and Level 2 aboveground storage tanks ("ASTs" or "tanks") that have currently been registered with the agency, nor does it include any substantive analysis of staffing needs or other costs that the agency

anticipates in conjunction with the implementation of the AST Act. The AST Act directs WVDEP to collect an annual operating fee for each regulated AST "in an amount sufficient to defray the costs of administering [the AST Act]." W. Va. Code § 22-30-12(a). Nevertheless, it is unclear whether the proposed fees properly reflect the additional demands that will be placed on the agency as a result of the statute's implementation. Specifically, although the AST Act—even in its amended form—imposes substantive obligations on a significant number of tanks,[16] it is WVONGA's understanding that the majority of these tanks are associated with oil and gas operations and are located at facilities currently subject to regular inspection by WVDEP. Thus, WVONGA questions whether expanding the scope of such inspections to include an inspection of the regulated ASTs on-site—which likely would consist of a visual inspection of the tanks and their associated secondary containment—can justify the imposition of operating fees in the amount currently proposed. This is particularly true where 50 percent of the initial registration fees to be collected—a requirement imposed for **all** ASTs, and not just regulated tanks, and thus projected to exceed $900,000[17]—and 100 percent of the registration fees for new tanks are also to be directed to the Aboveground Storage Tank Administrative Fund. *See* §§ 5.1, 5.2, Accordingly, WVONGA respectfully requests that the key underlying information upon which the agency based its Proposed Fee Rule be made available for public review to allow for a more meaningful examination of the adequacy of the fees proposed to be collected.

B. Section 3.1.b

The Proposed Fee Rule states that "[t]he transfer of [AST] ownership shall not be considered complete until the Secretary receives a completed amended registration and payment of

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[16] WVONGA is aware of only informal estimates by representatives of WVDEP that between 10,000-12,000 ASTs will be classified "regulated" (i.e., Level 1 and Level 2) tanks.

[17] This figure is based on an estimated 45,000 registered ASTs (likely an underestimate), and an initial registration fee of $40 per tank in accordance with W. Va. Code § 22-30-4(d).

the transfer fee." § 3.1.b. As an initial matter, WVDEP does not have the legal authority to decide when ownership of a tank transfers from the seller to the purchaser. WVDEP can control how ASTs are managed, but it cannot control who owns the tanks.

WVONGA strongly urges a more flexible and reasonable approach with regard to the transfer of AST registrations and certificates to operate. Sales of tanks, when they occur as part of the sale of one or more facilities, are often uncertain events. It is often difficult, if not impossible, to know—and thus to notify WVDEP—exactly when ownership of the property, and any tanks located onsite, will occur until shortly before the sale. Even if the exact time and date are known well in advance, in order to have the registration (and the concomitant right to control the tanks) transfer on the date of sale, the prospective purchaser already would have had to pay the transfer fee and obtain certificates to operate in its name in order to operate the tanks at the time of ownership change. That would be impossible, however, because only owners can register tanks.

It is important that the authority to operate tanks transfer at the same time that the property and tanks transfer to a new owner. This is not possible if the seller and buyer need to wait for approval from WVDEP for the transfer. Instead, WVONGA suggests that WVDEP allow 30 days after the sale of the AST for the new owner to submit an updated/amended registration and pay any appropriate fees. The payment of fees, and changing of names on registrations, is not time-sensitive, and allowing time for it to occur post-sale would not interfere with the proper implementation of the Act. If payment and registration do not happen in that 30-day period, then WVDEP has reserved to itself the ability to assess penalties, which should be sufficient incentive to bring about compliance.

C. Section 6.2

Section 6.2 establishes a penalty for failure to pay required fees of 50 percent of the balance assessed for those fees that are delinquent in excess of 30 days. WVONGA submits that this proposed fine is excessive, as the failure to pay the required fees in a timely manner already will expose a tank owner to civil penalties under Section 17 of the AST Act and the potential revocation of a Certificate to Operate. To the extent that an additional monetary penalty is needed at all, a fine of 5-10 percent would be more reasonable and appropriate.

D. Section 6.6

Section 6.6 provides that "the unpaid fee balance shall transfer to the new owner." WVONGA urges WVDEP to limit the transfer of any unpaid balance to those circumstances in which a certificate to operate is transferred. Under certain circumstances, the transfer of an AST to a new owner may be desirable, especially when an AST owner is insolvent or otherwise unable to manage an AST or pay assessed fees. In these situations, the transfer of an AST to a new owner capable of properly operating the AST should be encouraged, and not discouraged through the transfer of delinquent fees.

E. Section 7

Under Section 7.1 of the Proposed Fee Rule, all registration fees, annual operating fees, and annual response fees shall be indexed annually for inflation or deflation. WVONGA objects that this likely will result in steady fee increases for the regulated community that cannot be justified by the agency's needs in implementing the tank program. Accordingly, WVONGA requests the deletion of Section 7 of the Proposed Fee Rule in its entirety.

West Virginia Oil and Natural Gas Association
Comments Regarding Proposed Legislative Rule 47 C.S.R. 65
"Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment"
July 30, 2015

The West Virginia Oil and Natural Gas Association ("WVONGA") appreciates the opportunity to provide the following comments on the West Virginia Department of Environmental Protection's ("WVDEP") proposed legislative rule 47 C.S.R. 65, entitled "Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment" (the "Proposed AST Administrative Penalty Rule"), which was filed with the West Virginia Secretary of State on June 25, 2015. The Proposed AST Administrative Penalty Rule would establish a mechanism for the administrative resolution of violations of the Aboveground Storage Tank Act, W. Va. Code §§ 22-30-1 *et seq.* (the "AST Act"). Chartered in 1915, WVONGA 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 construction, environmental services, drilling, completion, gathering, transporting, distribution 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 80% of the production and 90% of the permits, operate more than 20,000 miles of pipeline across the state and provide oil and natural gas to more than 300,000 West Virginia homes and businesses.

Specific Comments

While WVONGA understands that the Proposed AST Penalty Assessment Rule was based almost entirely on 47 C.S.R. 1, the administrative penalty rule developed for the resolution of violations under the West Virginia Water Pollution Control Act, and believes that this rule

provides a useful base upon which to model a comparable rule under the AST Act, WVONGA nevertheless offers the following specific comments on the agency's proposal:

A. Penalty Adjustment Limitations

WVONGA requests that WVDEP revise Section 6.2 of the Proposed AST Administrative Penalty Rule to include appropriate limitations on each of the specified discretionary penalty adjustment factors. While WVONGA understands that WVDEP consistently applies internal guidelines with regard to maximum penalty adjustments for each factor, WVONGA believes that these limitations should be formalized through the legislative rulemaking process.

B. Clarification of "Willfulness"

Among the various discretionary penalty adjustment factors, the Proposed AST Administrative Penalty Rule includes both the "[d]egree of willfulness or negligence" and the "history of noncompliance." §§ 6.2.b.2, 6.2.b.4. WVONGA requests clarification and guidance regarding how the agency applies these factors. Specifically, how does the agency determine the degree of willfulness (aside from any violations involving deliberate misrepresentation or falsification)? Further, to the extent that an alleged violator's prior history of noncompliance is captured through a penalty increase based on "history of noncompliance," WVONGA requests confirmation that a corresponding upward adjustment will not be made under the "willfulness or negligence" factor (effectively doubling the penalty).

WEST VIRGINIA RIVERS COALITION

3501 MacCorkle Ave. SE #129 • Charleston, WV 25304 • (304) 337-7201 • www.wvrivers.org

July 30, 2015

WVDEP
AST Rule Comments
Attn: Joe Sizemore
601 57th Street, SE
Charleston, WV 25304

Hand-delivered at Public Hearing on July 30, 2015

RE: Comments on 2016 Proposed Aboveground Storage Tanks Rule (47CSR63)

Thank you for providing the public the opportunity to comment on the 2016 Aboveground Storage Tank (AST) rule (47CSR63). West Virginia Rivers Coalition submits these comments in collaboration with the organizations listed on the signatory page of this document. Each signatory has a vested interest in the quality of West Virginia's waters, and believes that effective implementation of the AST Act is critical to the future health and safety of our water supplies.

We appreciate the hard work of numerous Department of Environmental Protection (DEP) employees who have been involved in drafting various incarnations of AST-related proposed rules and implementing the Act. We present comments on the rule sequentially according to the sections in the rule, primarily focusing on changes in the rule from 2015 to the 2016 rule currently under consideration.

§47-63-1. General

DEP can now designate a change in the level assigned to an AST—but this change can be to a level with more or less stringent requirements (§ 1.5.b). Previously, DEP could only change the level to Level 1, which has the most stringent requirements. Also, this section provides no criteria for raising or lowering the level. ***We recommend this section be modified so that it only allows DEP to change a Level 2 AST to a Level 1 AST.***

§47-63-3 Registration

If there is a change in the previously submitted information, the AST owner must submit an amended registration form. Previously, if the substance changed or if an AST is relocated to a zone of critical concern (ZCC), the amended form was required to be submitted within 24 hours. The proposed rule

relaxes this requirement to three days (§ 3.1.d). ***We recommend keeping the original requirement to submit amended registration forms within 24 hours for these critical types of modifications.***

Similarly, for a change of operational status, the new rule relaxes the timeline for submitting the amended registration form from 60 to 180 days (§ 3.1.d.2). ***We recommend keeping the original requirement to submit amended registration forms within 60 days for changes in operational status.***

§47-63-4. AST Certificates to Operate and Permits/Plans

A new section is included that addresses Senate Bill 423's new language that allows owners and operators to seek alternative means of compliance with AST Act requirements if the entities are subject to other site-specific permits and plans (§ 4.2). The rule is helpful in outlining the procedure for such a request.

AST construction, design, integrity and secondary containment standards should be as stringent for modified permits/ plans as in the AST Act. ***We support the rule's assertion that DEP will interpret the terms "should", "may", "recommends", etc. in these industry standards as "shall".*** AST owners and operators will therefore be required to comply with the specified industry standards.

Inspection requirements should be as stringent for modified permits/plans as in the AST Act. ***We support this section maintaining inspection requirements of the AST Act for ASTs that would be approved under this alternative compliance option.***

It is in the public interest that the public be notified of requests for amendments permits/plans to incorporate AST requirements and given opportunity to provide comments through a public comment period. We see this as a substantial change of the enforcement mechanism for management and control of regulated tanks, thus contend that these requests should be treated as major modifications to permits/plans with public notice requirements. ***We strongly recommend the rule be modified to include a public notice and comment requirement of permit or plan modification requests.***

§47-63-5. Operation and Maintenance Requirements

The entire section regarding general operations and maintenance and a life-cycle preventive maintenance plan has been removed (§ 5.1 in the 2015 rule). We question the justification for removing this entire section.

More detail is provided on the inspections and certifications required for "intervening years". The rule allows for the owner, operator, or "a qualified representative" to perform the inspections and certifications required for intervening years (§ 5.2.b.5), "provided that the individual performing the inspection is qualified to perform tank inspections." However, there are no standards for how someone will be deemed to be qualified. ***We recommend the rule specify standards for determining if a person is "qualified to perform tank inspections" in this section.***

The rule requires Spill Prevention Response Plans (SPRPs) to be approved by DEP (§ 5.5), but it does not require SPRPs to be submitted to DEP if the owner or operator certifies that the AST is subject to certain other types of plans (§ 5.5.b.1). Also, in lieu of submitting an SPRP, the owner or operator can certify that the AST is subject to certain other types of plans (§ 5.5.b.1). Some plans would have already been submitted to DEP (e.g., a Groundwater Protection Plan). But other plans would not have been submitted to DEP (e.g., a Spill Prevention Control and Countermeasures Plan). ***We recommend the rule be modified to clarify that all plans be submitted to DEP and subject to public inspection.***

Requirements to consult with the Bureau for Public Health and County and Municipal Emergency Management Agencies in the development of SPRPs has been removed (§ 5.6.a in the 2015 rule). ***We recommend reinstating this requirement, at least for Level 1 ASTs.***

Safety Data Sheets (SDSs) no longer must be submitted with SPRPs; instead, SPRPs must only reference the location of the SDSs (§ 5.5.c.1). ***We recommend that the rule be modified to require the location of the SDSs to be easily accessed by emergency personnel and public water systems.***

For ASTs located in a zone of critical concern, SPRPs no longer must be provided to the applicable public water systems and County and Municipal Emergency Management Agencies (§ 5.6.e in the 2015 rule). ***We think this is an important accountability and safety measure and recommend the rule be modified to restore this provision.***

As noted in the Registration section, here again the rule relaxes timelines for tank owners. We are concerned about allowing in such further delays in in evaluating damaged ASTs and updating spill plans.

- The timeline for evaluating damaged ASTs has been relaxed from seven days to 10 days for Level 1 tanks and 30 days for Level 2 tanks (§ 5.4.b.1).
- The update frequency for SPRPs has been relaxed from three to five years for Level 1 tanks, and from five to seven years for Level 2 tanks.

§47-63-6. Reporting and Recordkeeping Requirements

Many recordkeeping requirements have been eliminated, including, for example, the requirements to log verifiable content levels, deliveries received, amounts and quantities currently being stored, and dispensing activities. (§ 6.1.b.13 in the 2015 rule) and the requirement to keep certain permanent records (§ 6.1.c in the 2015 rule). ***We think these are important requirements for tracking contents and recommend they be included in the rule.***

Upon the occurrence of a confirmed release, the owner or operator no longer must notify the nearest downstream public water supplier (§ 6.2.a in the 2015 rule). We see no justification to not err on the side of caution and require this notification. The definition of "confirmed release" involves a pollutant that has entered a water supply or escaped its secondary containment. ***In the interest of protecting the public from potential drinking water contamination, we recommend modifying the rule to require notification to the downstream water system when a "confirmed release" has occurred.***

Again, we note an easing of timelines for tank owner requirements in this section as the timeline within which findings must be reported to DEP regarding suspected or threatened releases has been extended (§ 6.3.a).

§47-63-8. AST Design, Construction, and Installation

There are several changes from the 2015 rule of concern, as they appear to weaken the AST design standards:

- Explicit language requiring protection from corrosion and deterioration, a release prevention system, and a release detection monitoring system has been removed (§ 8.1.c-e in the 2015 rule).
- The 2015 rule required all new ASTs to be double walled, double bottomed, or placed on a Release Prevention Barrier. In the new rule, this requirement only applies to Level 1 tanks (§ 8.2.i).
- Many requirements for vaults have been deleted (§ 8.5).
- The word "may" was added to requirements regarding ancillary equipment, which appears to make these requirements optional (§ 8.6.a). The wording in the 2015 rule was more strict.
- When deficiencies are noted in inspections but the AST is still certified as Fit for Service, the deadlines for addressing the deficiencies have been extended.

We question if there is compelling justification for why these standards have been weakened from the 2015 rule.

§47-63-10. Release Prevention, Leak Detection and Secondary Containment

Again, there are several changes of concern from the 2015 rule, as they appear to weaken the release prevention standards:

- Many requirements regarding transfer operations not continuously monitored by a transfer operator were removed (§ 10.1.g in the 2015 rule).
- Secondary containment requirements that previously applied to all ASTs now apply only to Level 1 tanks (§ 10.2.f). These requirements include directing releases to a monitoring point and the permeability of the secondary containment.
- Freeboard calculations no longer must make use of a 25-year, 24-hour storm event. Instead, the 2015 rule requires "the appropriateness of using" this storm (§10.2.i.2.G).
- The paragraph related to secondary containment and combustible materials was modified in a way that makes it weaker and contradictory (§10.2.i.3).
- Requirements related to keeping secondary containment free of woody vegetation, debris, and other material has been weakened (§10.2.i.4).
- Certain leak detection records are no longer required to be kept (§10.3.l).

We question if there is compelling justification for why these standards have been weakened from the 2015 rule.

§47-63-12. Delivery Prohibition

There is a mistake in a subsection reference in § 12.2.a. The phrase "delivery prohibition requirements of subsection 14.1 above" should be changed to "delivery prohibition requirements of subsection 12.1 above".

We support the inclusion of the delivery prohibition requirements as a means of accountability and enforcement of standards.

§47-63-13. Financial Responsibility Requirements

The bonding and financial assurance requirements detailed in the rule are critically important, but we are concerned that the bond amounts are not sufficiently high (20 cents per gallon for Level 1 tanks, 10 cents per gallon for Level 2 tanks, with a minimum of $5,000). The bond amount for Freedom Industries' 48,000-gallon MCHM tank would have been a paltry $9,600. This amount is nowhere near the millions of dollars required to fully remediate the site and to compensate the people and businesses left without clean drinking water. ***We recommend that DEP significantly increase the bond amounts, at least for Level 1 tanks, so that the bond amounts are commensurate with the potential liability that would be incurred if the tank fails.***

<u>47CSR64 – Aboveground Storage Tank Fee Assessments</u>

Fees should be set as so as to adequately fund additional staffing and operations required to fully implement the AST program.

While we appreciate the significant resources devoted by existing DEP staff to get the AST program established, we are concerned about pulling existing staff away from other important responsibilities of the DEP and the Division of Water and Waste Management. We appreciate DEP's acknowledgment that additional staff positions should be created to manage the AST program, and funding them through registration fees is a sensible approach. ***We recommend DEP annually evaluate needed staffing capacity to implement the AST program and adjust fees accordingly to assure the program is fully staffed and able to carry out its responsibilities.***

Thank you for your consideration of these comments.

Signed,

Angie Rosser, Executive Director
West Virginia Rivers Coalition

Nancy Novak, President and Helen Gibbins, Director
League of Women Voters of West Virginia

Maya Nye
People Concerned About Chemical Safety

Cynthia D. Ellis, President
West Virginia Highlands Conservancy

Brent Walls
Upper Potomac Waterkeeper

Gary Zuckett, Executive Director
West Virginia Citizen Action Group

Conni Gratop Lewis, Legislative Coordinator
West Virginia Environmental Council

Julie Archer
West Virginia Surface Owners Rights Organization

WEST VIRGINIA
RURAL WATER
ASSOCIATION
Every drop counts.

West Virginia Rural Water Association

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

July 27, 2015

WV DEP
AST Rule Comments
Attn: Joe Sizemore
601 57th Street SE
Charleston, WV 25304

Comments re: 47 CSR 63 AST Rule

West Virginia Rural Water Association (WVRWA) is a non-profit association whose members include most of the public water and wastewater utilities in the state. We welcome the opportunity to submit these comments, in response to WVDEP's request for public input for its Aboveground Storage Tank (AST) Rule. Our concerns primarily include potential impacts to the quality of public drinking water sources.

These comments are being submitted as part of WVDEP's public comment period, ending July 30, 2015, where the agency is seeking input from stakeholders on its draft rule 47CSR63, released June 25, 2015. WVDEP had released an earlier draft of this rule, in December of 2014, but it was superseded by the WV Legislature's passage of a new AST Act (SB423, which modified the previous year's SB373).

Our comments on the current version of the rule will refer to the earlier draft, both Acts, as well as other related regulations and Acts, as appropriate. Our comments are in regards to certain definitions in the rule, sections on Spill Prevention and Response Plans, as well as timely and effective communications.

1. **Definition of "Facility"** (Rule 2.23) uses the same language in 2015, as in the 2014 version. Unfortunately the text is confusing, especially where it refers to oil and gas facilities. The draft reads: "However, oil or gas entities with multiple tanks at various locations may consider their or their operator's office or laydown yard as their facility location for purposes of AST registration." As oil and gas facilities contain the vast majority of ASTs in the state, the message should certainly be clearer. Under the draft rule's text, facility locations could be confused with WVDEP's need to obtain each AST's individual accurate latitude/longitude.

Oil and gas "facilities", are better defined by WVDHSEM, as well as Ohio's EPA, for Tier II reporting, as well as by USEPA for Spill Prevention, Control, and Countermeasures (SPCC) requirements under 40CFR112. These three agencies describe oil and gas "facilities" as containing, ASTs, very often oil and gas wells, and the piping between them. WVDEP's AST inventory has not been (but could be) linked to WVDEP's Oil and Gas Well inventory, which could be helpful to emergency responders, as well as WVDEP and Source Water Protection Teams in trying to locate and identify thousands of oil and gas ASTs whose locations have been inaccurately reported or are still unreported.

The AST Rule's definition of Facility could be strengthened by referring to the federal description of Facility in its SPCC Guide for Regional Inspectors. Page 2-18 of this guide, for Oil & Gas Facilities, is attached to these comments as Appendix 1. The SPCC program allows the facility owner/operator to define the boundaries of his facility, including its ASTs, wells and interconnecting pipelines. The facility's SPCC will then address spills from any and all of these things. If the facility is defined by the owner/operator as a huge area, he will have more miles of pipe to include in his facility plan. Also, the SPCC program does not allow gerrymandering of facility boundaries in ways that skirt the AST owner/operator responsibility to have an effective spill plan.

2. **Definition of "Location"** (Rule 2.34) is the same in both drafts. It is also not clear. It does not mention the need for accurate lat/long coordinates for each AST. Instead, the definition of "location" simply circles back to "facility".

   This proposed definition of location is not helpful in supporting the mapping function of the AST program, which is in part, to identify with reasonable certainty, where the ASTs are located. The AST Rule should specify that each AST's location, as a reasonably accurate latitude / longitude, be submitted to WVDEP. Also, in order for WVDEP to have some means of checking the quality of the AST locations, when ASTs are registered for Oil & Gas Facilities, the distance and direction from each AST to the nearest Oil & Gas Well it is connected to should be provided, along with the API # for that well. WVDEP could then query its AST and Oil & Gas Well databases, identify those AST-Well pairs whose coordinates are not reasonably close to each other, and determine whether the coordinates of the AST or the well were in error.

3 Definitions of Level 1, 2 and 3 ASTs. The 2014 draft had definitions for these important terms. More importantly Level 1 and Level 2 tanks are discussed throughout the rule without a definition which says what they are in the 2015 draft. Level 3 ASTs (containers with potable water and other non-hazardous liquids) were exempted from regulation by SB423. However, the new draft should still define Level 1 and 2 ASTs, as per SB423, which limited Level 2 ASTs to only those inside the newly created Peripheral Zones of Critical Concern (PZCCs).

4. **Spill Prevention Response Plans (SPRPs in** Rule 5.5**).** Reflecting a changing deadline for regulated AST owners under SB423 vs SB373, the June 2015 draft rule has a deadline by which SPRPs are to be submitted to WVDEP by December 9, 2015, one year later than in the 2014 draft rule. Moving of the SPRP deadline back one year makes life easier on AST owners, but will mean completion of Updated Source Water Protection Plans by their deadline of July 1, 2016, will be made more difficult. The WVDEP Secretary could request copies of draft SPRPs for regulated ASTs be submitted a month or two prior to the December 9, 2015 deadline, so they could be available for earlier review by WVDEP, local Source Water Protection Teams, the PWSSC, et al.

    1. **SPRP Updates** The 2014 draft rule required SPRPs to be updated no less frequently than every 3 years for Level 1 ASTs, and every 5 years for Level 2 ASTs. Although SB423 changed this to every 5 years for all regulated ASTs, the June draft rule allows for Level 2 ASTs to be updated every 7 years. The rule should comply with the act.

    2. **SPRPs Provided Directly to PWSs** The 2014 draft rule required AST Owner/operators to provide Public Water Supplies and local Emergency Agencies with copies of their SPRPs, but this requirement is missing from the June 2015 version of the rule. Although SB423 requires the AST Owner/operators to provide notice that some, limited information is available, the SPRPs are not required to be provided directly. Even so, AST Owner/operators should be encouraged to communicate directly with downstream PWS and local EMS personnel. Otherwise, PWSs and local Emergency Agencies should be able to get copies of SPRPs with WVDEP's assistance.

    3. **SPRP Minimum Elements**

        A. **Hotline telephone number** - The 2014 draft rule specified the minimum elements to be contained in an SPRP, including WVDEP's Spill Hotline phone number. The June 2015 draft rule does not. Instead, it refers to section 22-30-9, which lacks some important details, such as requiring the Hotline telephone number to be included. The June 2015 draft would be strengthened if it specified the Spill Hotline telephone number will be included. It might also be helpful if internal to WVDEP, the AST program was included on the Spill Hotline internal email list so AST personnel could be notified promptly when a spill from an AST occurs.

B. **Contact Information** –

a. Rule 5.5.c.5 requires contact information to be included in the SPRP, however, it is critical that that information also be provided to the nearest downstream public water supply intake and to all public water supply intakes up to 20 miles downstream of the regulated above ground tank so that the public water suppliers can confirm that the information is correct or not. The rule should make clear that the regulated above ground storage tank owners or operators contact information is also included in the SPRP, and that all the emergency contact information is being provided to the entities outlined in the rule, so they may confirm its accuracy as well as be informed as to who to call during an emergency.

b. Rule 5.5.d.contains a requirement that the owner of the regulated above ground storage tank located in a zone of critical concern shall annually update the contact information required in 5.5.c.5. There is no requirement that the owner provide the updated contact information to the public water systems up to 20 miles downstream. The rule should be amended to require that any updates are communicated to the public water supply systems.

For reference, Pennsylvania Act 1989-32, which Senate Bill 373 was originally based on, requires that the owner of the aboveground storage tanks provide a notice to all downstream municipalities, downstream water companies and downstream industrial users within 20 miles of the aboveground storage tank facility site and the local municipality and county in which the facility is located. The notice shall provide a detailed inventory of the type and quantity of material in storage at the facility. The requirement of providing a detailed inventory to the water system is nowhere in the West Virginia proposed rules. It must be in the rule in order for water systems to prepare their source water protection plans, specifically, their contingency planning.

C. **SPRP Substitutions** The June 2015 draft rule allows for AST Owner/operators to meet the requirements for a SPRP if they have a WVDEP approved Groundwater Protection Plan (GPP), or a federally required Spill Prevention, Control, and Countermeasures (SPCC) Plan. These documents are required to be maintained at the owner/operator's facility, and provided to WVDEP, or the USEPA (in the case of the SPCC), upon request. The 2014 draft rule did not allow for this substitution. The new 2015 draft rule could be strengthened by saying

these documents may be used in lieu of a SPRP if they are up to date, and include all the information required of a SPRP (such as accurate lat/longs for the ASTs, identity of nearest downstream PWS intake and emergency contact information for it, etc, and whether the AST is located inside a SWPA, ZCC, PZCC, SWIGPA, etc). If a GPP or a SPCC is substituted for a SPRP, WVDEP's Secretary should require copies of the substituted documents be kept on file at WVDEP, and be available for review by PWSs, Emergency Agencies, and other stakeholders.

5. **Affected or diminished water supplies (Rule 7.3)** Rule 7.3.b.1 discusses the requirements for a temporary water supply. The rule should at least reference the Public Service Commission's Water Rule 4.12.i which discusses the responsibilities of a water utility when there is an unplanned service interuption.

Thank you for the opportunity to comment on these regulations. If there are any questions, feel free to contact me at amyswann@wvrwa.org or call me at 304-201-1689.

Sincerely,

Amy L. Swann

Amy L. Swann, Executive Director

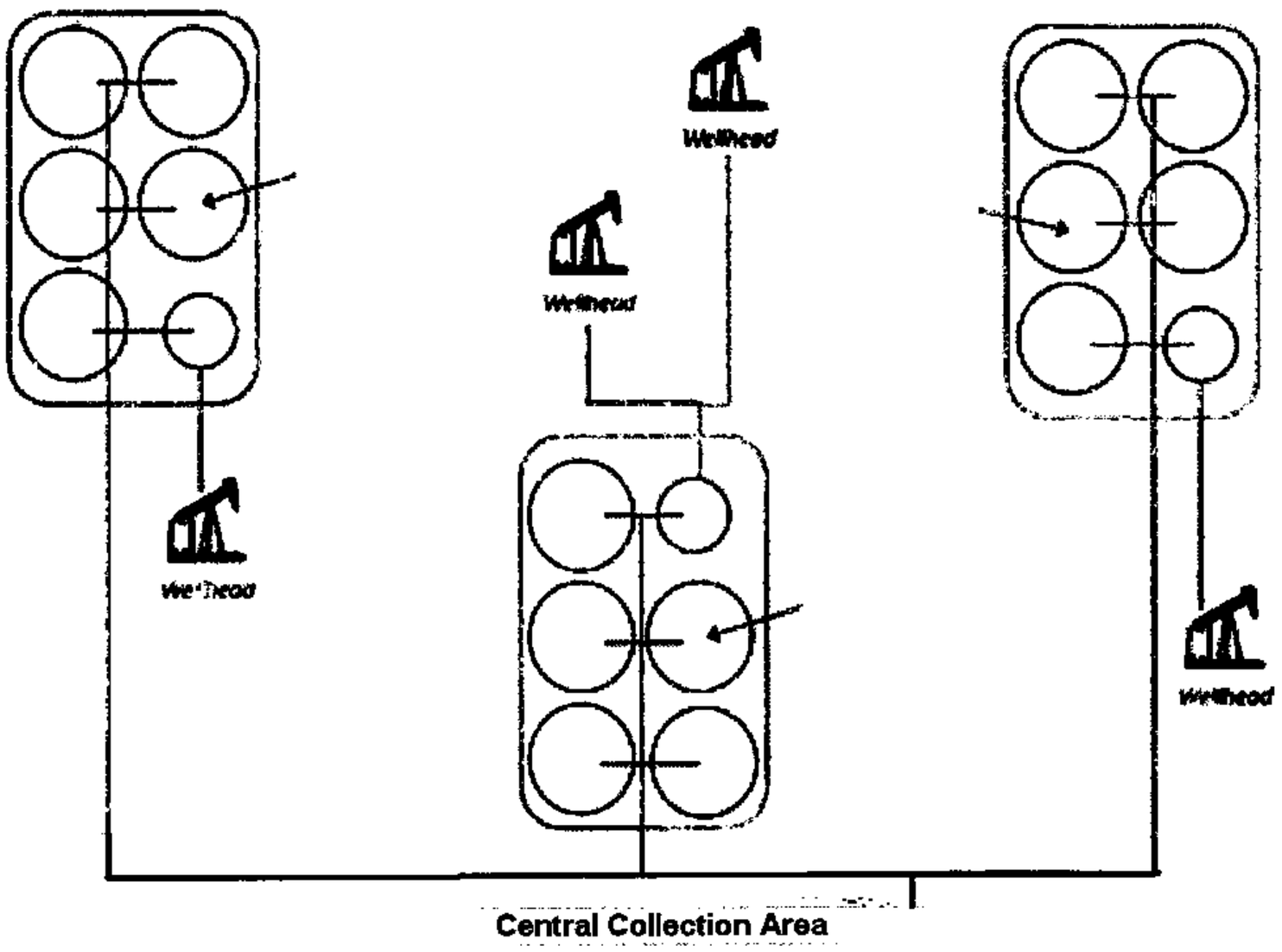

Figure 2-2: Separation of parcels at an oil production facility.

Determination: Given their geographic separation and the nature of the individual lease agreements, **each lease could be considered a separate facility**. Each tank battery stores a total aboveground capacity of oil greater than 1,320 U.S. gallons, so under such a scenario the operator must prepare and implement a separate SPCC Plan for each tank battery and its associated wellheads, flowlines, and equipment, as individual facilities. Any gathering lines that transport oil from these individual facilities into a centralized collection area involve the transportation of oil between facilities ("inter-facility") and are therefore UnotU within EPA jurisdiction. These "inter-facility" gathering lines do not need to be included in the SPCC Plans. In this example, the central collection area is a separate facility and may be subject to SPCC requirements. If the central collection area facility meets the SPCC rule applicability criteria, then a separate SPCC Plan must be developed.

Alternative: Because the definition of facility is flexible, the **operator could alternatively choose to consider all three parcels and the central collection area as one facility**, based on his common ownership or operation of all of them. Under this approach, the operator would only need to prepare one SPCC Plan that covers the components of all parcels. Any gathering lines connecting the tank

batteries of each parcel are then considered "intra-facility" gathering lines and must be included in the SPCC Plan.

WEST VIRGINIA
ASSOCIATION

2006 Kanawha Blvd., East
Charleston, WV 25311
304.345.2800
304.343.5810 Fax
wvta@wvtrucking.com
www.wvtrucking.com

July 30, 2015

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

Re: Legislative Rule for Aboveground Storage Tanks

Thank you so very much for giving the West Virginia Trucking Association the opportunity to address the proposed Aboveground Storage Tank rules. The trucking industry appreciates your willingness to work with us on the issues that greatly affect the members of our association.

The trucking industry is very concerned with, §47-63-12.1, the proposed Delivery Prohibition rule and the negative impacts that it will cause. The burden of confirming appropriate registration and compliance should not be placed on the hauler or product supplier. In this instance, the burden should be placed exclusively on the owner/operator to register the tank and adequately comply with AST regulations. Additionally, the tank owner/operator should be cited if they knowingly receive product in an unregistered tank.

It is our assertion that this provision is outside the authorization of Senate Bill 373. We further maintain that this provision was discussed at length with legislative leaders during the recent session and they distinctly decided not to include the language in the bill.

Again, we appreciate your continued willingness to work with us on the issues important to our industry and your consideration of our comments. We are available to discuss the above item at your convenience.

Sincerely,

Janet S. Vineyard
President