

RESPONSE TO COMMENT

Title 47 Series 65

Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment

July 29, 2015

Comment #1 Numerous commenters requested that the WVDEP not weaken standards or relax timelines for enforcement. Commenters requested strong enforcement of AST rules with strong laws and penalties.

Response: WVDEP believes that the standards in the proposed Rule are protective of public health and the environment and achievable by the regulated community. The Agency believes that the need for protection of public health and the environment must be considered in determining deadlines for compliance, but the Agency must also consider how practical it is for the regulated community to come into compliance with new regulations.

Comment #2 A commenter suggests that the timeframe for a response to a proposed consent decree be extended to at least 30 days from the current ten days in the proposed rule.

Response: WVDEP disagrees with this comment. This ten day time frame is consistent with other civil administrative penalty rules such as 33 CSR 27 and 47 CSR 1. The agency believes that ten days is adequate time for the initial response and the rule allows for additional time to complete the process. Prior to final entry of the Order, a recipient may withdraw from the process.

Comment #3 A commenter suggests that section 6.3 be amended to state that the Secretary may, but does not have to, calculate a penalty based on each day of violation.

Response: WVDEP disagrees with this comment. This language is consistent with other civil administrative penalty rules such as 33 CSR 27 and 47 CSR 1.

Comment #4 The commenter requests the WVDEP to include appropriate limitations on each discretionary penalty adjustment factors. The commenter wishes these limits to be formalized through the legislative rulemaking process.

Response: The application of the penalty adjustment factors is heavily dependent upon the circumstances as it relates to each enforcement case; therefore, WVDEP cannot provide specific information on what the

limitation of each penalty adjustment would be. Appendix A of the Penalty Rule provides a penalty matrix for determining penalty calculations which provides for a maximum penalty amount in each of the matrix categories.

Comment #5 The commenter requests clarification and guidance regarding the application of the penalty adjustment factors of "degree of willfulness or negligence" and "history of noncompliance". The commenter wants to know how the agency determines degree of willfulness. In addition, the commenter requests confirmation that a penalty adjustment for history of noncompliance will not also be made under the "willfulness or negligence" factor.

***Response:** The application of the penalty adjustment factors is heavily dependent upon the circumstances as it relates to each enforcement case; therefore, WVDEP cannot provide specific information on how every case will be handled. In assessing the degree of willfulness or negligence, factors, such as but not limited to the following may be considered: How much control the violator had over events constituting the violation (e.g., whether the violation could have been prevented or was beyond the owner/operator's control, as in the case of a natural disaster); The foreseeability of the events constituting the violation; Whether the violator made any good faith efforts to comply and/or took reasonable precautions against the events constituting the violation; Whether the violator knew or should have known of the hazards associated with the conduct; and, Whether the violator knew or could have reasonably known of the legal requirement that was violated. When assessing the history of noncompliance, factors, such as but not limited to the following may be considered: Number of previous violations; Seriousness of the previous violations; Time period over which previous violations occurred; Similarity of the previous violations; Violator's response to the previous violation(s); and, whether the violator had previous administrative or civil actions taken for the same or similar violations.*

Comment #6 A commenter stated that multi-day penalties should not apply to failure to register, failure to obtain a certificate to operate, or for providing false information. Furthermore, the civil penalty limit on a daily basis is \$10,000 for each day of violation, not for each violation. Multiple violations on any given day are still limited to \$ 10,000 for all the violations.

Response: WVDEP disagrees with this comment. Failure to register and failure to obtain a certificate to operate are egregious violations that circumvent the entire AST regulatory program. Furthermore, it is customary to treat each day of an ongoing violation as a separate violation. This approach is consistent with RCRA and Clean Water Act enforcement and is appropriate in this instance as well.