

RESPONSE TO COMMENT

Title 47 Series 64

RULES GOVERNING ABOVEGROUND STORAGE TANK FEE ASSESSMENTS

July 29, 2015

Comment #1 The commenter requests that the key information upon which the agency based in proposed fee rule be made available for public review to allow for a better examination of the adequacy, of the fees proposed to be collected. The commenter questions if expansion of the scope of inspections can justify an operating fee.

Response: A portion of the compliance monitoring strategy that has been developed for ASTs in the state of WV is the statutorily mandated inspection frequencies found in 22-30-15(d). Other factors considered include but are not limited to known costs of staffing to include salary, medical coverage and pensions as well as indirect costs such as rent, utilities and telephone / data. This newly formed regulatory program represents a large expenditure of resources not previously required by the WVDEP and an associated fee to adequately fund the program is easily justified.

Comment #2 A commenter noted that they recommend that DEP annually evaluate needed staffing capacity to implement the AST Program and adjust fees accordingly.

Response: Evaluation of the AST program will be ongoing and accomplished in part by establishing and tracking completion of a compliance monitoring strategy. Staffing needs have already been contemplated through careful consideration of all known variables. By inherent design, the number of regulated tanks will drive the size of the needed regulatory staff.

Comment #3 A commenter felt that the rule should provide certainty regarding when WVDEP would invoice tanks. The commenter suggested that the end of each calendar year would be appropriate.

Response: WVDEP anticipates that invoicing for the annual operating fees will be performed shortly after the effective date of the Fee Rule and then annually thereafter.

Comment #4 A commenter stated that Registration fees are set by statute. There is no authority to change them. Response fees are recalculated every year to maintain 1 million dollars. That leaves only the annual operating fees to be adjusted automatically. DEP should reserve the right to do this instead of mandating it.

Response: WVDEP agrees with the commenter in part and has modified Section 7 of the rule such that inflationary adjustments do not apply to registration or Protect Our Water Fund assessments. The agency believes that a continued consideration of economic inflation is a fiscally responsible

approach to annual fees. This will help to guarantee AST Program viability moving forward.

Comment #5 Numerous commenters requested that WVDEP establish registration fees that adequately fund and staff the program.

Response: WVDEP believes that the proposed fees are sufficient to adequately fund and staff the program.

Comment #6 A commenter felt that any fees imposed under the rules should be subject to facility caps.

Response: WVDEP disagrees with the commenter, but understands the commenters concerns. The WVDEP is required to administer the AST Program through the collection of fees. WVDEP arrived at the proposed fees after evaluating the number of personnel needed to implement the AST Act and associated rules taking into account; salaries and benefits, equipment, training, and inspection frequency.

Comment #7 A commenter felt that the Level 1 operating tank fees are excessive and arbitrary and sought justification as why there was a large difference between the two fees. The commenter felt that the level 1 fees should be reduced to be more in line with the level 2 fees. A commenter stated that the Fee Rule is vague. What is the method of calculating the fee?

Response: WVDEP disagrees with the commenter. The proposed fees are not arbitrary. WVDEP evaluated the number of personnel needed to implement the AST Act and associated rules taking into account; salaries and benefits, equipment, training, and inspection frequency. Level 1 tanks are required to be inspected once every three years. The inspection frequency is the largest single factor affecting the difference in fees for Level 1 and Level 2 costs.

Comment #8 A commenter stated that the 50% Penalty for a late payment is too high. A penalty of 5% per month stopping at 25% after 5 months would be more reasonable. Late payment penalty kicks in 30 days after invoice is sent regardless of when it is received.

Response: WVDEP disagrees with this comment. A 50% late penalty is analogous to the late fee for unpaid Underground Storage Tanks Fees. This late fee adds consistency across the tank program and addresses significant agency resources required to collect unpaid fees.

Comment #9 The commenter believes the proposed penalty is in excess since failure to pay the required tank fees already exposes the tank owner to civil penalties under section 17 of the AST Act. The commenter believes a penalty of 5-10% would be more reasonable and appropriate if necessary. A commenter stated that a 50% penalty for late payment of assessed fees as stated in 6.2 is exorbitant and unduly punitive. The

commenter stated that a 5% late fee of the unpaid balance is more reasonable and consistent with normal commercial transactions.

Response: WVDEP disagrees with this comment. A 50% late penalty is analogous to the late fee for unpaid Underground Storage Tanks Fees. This late fee adds consistency across the tank program and addresses significant agency resources required to collect unpaid fees.

Comment #10 The commenter requests the deletion of this section in its entirety since he feels it will result in a steady fee increase for the regulated community that cannot be justified by the agency's needs for implementing the tank program.

Response: WVDEP disagrees with this comment. The concept of economic inflation and its relationship to expenditure of agency resources is apparent and easily justified.

Comment #11 The commenter feels that the WVDEP does not have the legal authority to decide when ownership of a tank transfers from seller to purchaser. The commenter urges a more flexible approach to the transfer of AST registrations and certificates to operate. The prospective purchaser cannot pay the transfer fee and obtain certification in order to change ownership because that can only be done by the actual owner (not the prospective owner). The commenter suggests that the WVDEP allows 30 days after the sale of the AST for the new owner to submit and updated/amended registration and pay any fees. If this does not occur within the 30 days, then WVDEP can assess penalties to bring about compliance.

Response: WVDEP has amended the Fee rule to make it clear that decision to consider the transaction complete is administrative in nature. This designation is necessary for accurate tracking of ownership and control associated with ASTs in West Virginia. It should also be noted that section 3.6 of 47 CSR 63 allows the new tank owner 30 days after assuming ownership of the tank.

Comment #12 A commenter stated that the end of the first line in 6.4 should be "may" and not "my".

Response: WVDEP has changed "my" to "may".

Comment #13 A commenter felt that the annual response fees were troubling because each Level 1 and Level 2 AST would be assessed a fee and that cost was not stated in the fee rule. The commenter suggested that the annual fee should be based on the number, contents, and location of the ASTs.

Response: WVDEP understands the commenters concerns of not knowing exactly how much the annual response fee will be each year. However, the language within the Fee Rule is consistent with Section §22-30-13 (b) of the AST Act which clearly specifies, "the secretary shall vary the fees annually to a level necessary to produce a fund of no more than \$1 million after three

years from the effective date of this article, and to maintain an aggregate fund of \$1 million at the beginning of each calendar year thereafter."

Comment #14 The commenter requests that the WVDEP limit the transfer of any unpaid balance to those circumstances in which a certificate to operate is transferred. He believes that when an AST owner is insolvent or unable to manage his ASTs, the transfer of any unpaid balance will discourage any transfer to a new AST owner who can properly manage the tanks.

Response: WVDEP understands the concern of the commenter. However, collection of fees is paramount to the continued viability of the AST Program. Potential transactions between AST owners cannot be considered during the fee collection process. Regardless of these transactions, both, real or potential, the ASTs are subject to substantive regulations and this requires the expenditure of resources by the agency.

Comment #15 A commenter stated that Section 4.1 should expressly provide that any invoice for fee assessment be delivered via the USPS to the owner's address based on the AST registration information.

Response: WVDEP disagrees with this comment. While initially the agency mails an invoice to the contact information provided by the responsible party, in some instances hand delivery, process server or a courier service must be utilized.

Comment #16 A commenter stated that section 4.2 be clarified to authorize owners to pay the assessed fee for each AST separately or specific group of AST's. In the event an owner is unable to pay timely, the owner should be able to pick and choose which AST's are paid in full.

Response: WVDEP disagrees with this comment. Unless there is an error in an invoice, the recipient is responsible to pay the invoice in its entirety. 3.2.a of the rule requires collection of fees from all owners for all level 1 and 2 ASTs that have not undergone permanent closure. The ability to pay or the option to defer fees associated with certain tanks is not provided for in this rule.

Comment #17 A commenter urged the WVDEP to modify the Proposed Fee Rule 4.3 to allow AST owner at least 60 day from the invoice mailing date by which to pay the assessment fees to provide ample time to acquire liquidity to pay the fees assessed.

Response: WVDEP will make every effort to transmit invoices well in advance of the specified due date. It is anticipated as the program develops the annual bill for fees will occur at the same time each year as it does with other fees collected by WVDEP. The receipt of the invoice should not be unanticipated by the responsible party.

Comment #18 A commenter questioned whether a failure to pay a fee assessment constitutes a violation of 22-30-17 and requested that 6.1 be deleted or modified.

***Response:** "The failure to pay an assessed AST fee is not a violation of 22-30-17, it is a violation of standard promulgated by the secretary pursuant to Article 30 and makes the violator subject to a civil penalty not to exceed \$10,000 for each day of violation as provided for in 22-30-17(c)."*

Comment #19 A commenter urged the WVDEP to modify 6.6 to limit the transfer of any unpaid balance to the circumstances in which a certificate to operate is transferred.

***Response:** Answered above... line 15... from WVONGA.*

Comment #20 A commenter requested that the WVDEP provide a rationale for imposing an automatic inflation adjustment for assessed fees when the amount of fees needed by the WVDEP may very well decline as the AST Act is implemented. More particular, 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.

***Response:** Similar to row 11 above, it is unclear how or why fees needed to fund the program would decline over time. However, staffing needs relative to inspections commitments and available funding are continuously evaluated by the WVDEP. The Annual Response Fee as well as the Registration Fee have been removed from section 7.1 of the rule.*

Comment #21 A commenter suggested that Level 1 AST's containing brine water or oil having a capacity of 10,000 gallons or less be treated as Level 2 AST's for purposes of assessing fees in section 3.2.a.1. The commenter believes that imposing the same fee for small AST containing innocuous fluids as large AST's is hardly fair or equitable.

***Response:** WVDEP disagrees with this comment. The definition for a Level 1 regulated AST is statutory and located at 22-30-3(13). Furthermore, 22-30-15(d) mandates a regulatory inspection of all Level 1 tanks "at least one every three years". This mandatory inspection frequency requires the same resource expenditure by the agency regardless of tank contents. Therefore all Level 1 tanks are assessed the same fee.*

Comment #22 A commenter suggested that in section 4.4.c that the following word "identified" and the words "and communicated in writing to the AST owner or the Secretary as appropriate" be inserted to clarify that the error not only be identified but also communicated to the entity who committed the asserted error.

***Response:** WVDEP disagrees with this comment. This language is consistent with language found in the UST Fee Assessment Rule at 33CSR31-4.4.c. 4.4.b allows for the written notification of erroneous invoices. WVDEP agrees that errors be communicated between the agency and the responsible party, but does not believe it must be further codified in this section. This type of communication is customary and is to be expected.*

Comment #23 A commenter requested that Proposed Fee Rule conform to the definition contained in the AST Act. Specifically, the Annual Operating Fee and

Annual Response Fee apply only to "regulated AST's" as defined in 20-30-3(15). AST's or tanks should be clarified to be "regulated Level 1 AST" or "regulated Level 2 AST" in 3.2.a, 3.2.a.2, 3.3.a, 3.3.b and 3.4.c.

Response: The agency believes it is clear that annual operating and response fees are only applicable to regulated level 1 and 2 tanks. The terms "level1" and "level 2" appears throughout the specified sections.

Comment #24 A commenter requested that the language in 3.1.b be clarified that the transfer fee applies to both the amended registration and the transfer of the related certificate to operate.

Response: The agency believes that the language in section 6.4 and 6.5 of the rule makes it clear that payment of all applicable fees is one requirement for issuance of a certificate to operate. The remainder of the requirements are located in 47 CSR 63-4.

Comment #25 A commenter requested that the language in 4 be clarified that an ownership change is effective upon the completion of an amendment to the AST registration and payment of the transfer fee provided the proposed fee rule and that the certificate to operate transfers with the registration to the new owner.

Response: WVDEP would like to clarify that notification of a change in ownership and payment of applicable fees is one portion what is required to secure a certificate to operate by a new owner. The remainder of the requirements are located in 47 CSR 63-4 which include compliance with financial responsibility requirements as well as other provisions of the AST Act.