



WEST VIRGINIA RIVERS COALITION

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Submitted via email to WVDEPtankrules@wv.gov

RE: Comments on Proposed Aboveground Storage Tanks Rule (47 CSR 63)

Thank you for providing the public the opportunity to comment on the Aboveground Storage Tanks (AST) rule (47 CSR 63). 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 of our water resources.

We appreciate the hard work of numerous Department of Environmental Protection (DEP) employees who have been involved in drafting this proposed AST rule ("proposed rule"), the rough draft AST rule ("rough draft rule"), and the interpretive rule that was finalized in October 2014 (47 CSR 62) ("interpretive rule"). A lot of work needed to be done quickly, in order to meet the mandate from Senate Bill (SB) 373.

We strongly agree with Secretary Huffman's opening remarks at the October 2014 stakeholder meeting, at which he said that the governor's foundation for making decisions related to SB 373 and its associated rules is protecting our drinking water. Clean drinking water is West Virginia's most important foundation for protecting human health and supporting economic development.

We present comments on the rule sequentially according to the sections in the rule.

1. General

In § 1.5, we agree with DEP not to include blanket exclusions for ASTs used by entire industries, such as coal mining and natural gas drilling. All industries must equally share the responsibility to keep our drinking water clean and safe. Rather than excluding entire industries, the risk-based levels proposed by DEP (with modifications specified below) are a more appropriate way to address the fact that some ASTs present greater risks than others.

We agree that ASTs should be divided into levels based on their risk to human health and the environment, but we suggest some refinements of the definitions.

The proposed rule includes the same three risk-based AST levels that were introduced in the interpretive rule, but the language is not entirely consistent between the two rules. The language in the proposed rule has also been changed from the rough draft rule. Given that the interpretive rule will only be in effect until June 1, 2015, we focus these comments on the proposed rule, without consideration of the definitions used in the interpretive rule. The proposed rule divides the definitions between § 1.5.c, §2.36, §2.37, and §2.38.

Tanks are classified as Level 1 based on location, size, and contents. Regarding contents, the proposed rule is less stringent than the rough draft rule. It now requires that substances on the List of Lists must be present at a concentration of 1% or greater. It also exempts petroleum from triggering a Level 1 designation.

We recommend that DEP reinstate the definition used in the rough draft rule. A tank storing any substance on the List of Lists, no matter the concentration, should be classified as Level 1, and petroleum should not be exempted.

§2.36 also provides that the Secretary can designate any AST as Level 1. **We support this very important provision, and we suggest that the Secretary use the now-completed AST registration database to systematically search for and designate certain tanks as Level 1. These ASTs should include, for example, tanks that store MCHM and other harmful substances that are not listed as hazardous substances under CERCLA and are not on the List of Lists. As we all learned last January, a spill of much less than 50,000 gallons of MCHM was sufficient to contaminate the water supply for 300,000 West Virginians.**

§2.37 states that Level 2 tanks are “considered to be low risk based upon location with respect to water intakes and populated areas.” We suggest editing this language for two reasons:

1. Level 2 tanks are not “low risk,” although they do present a lower risk than Level 1 tanks.
2. The lower level of risk is not due solely to location. It may be due to location, size, and/or contents.

Both of these points are confirmed by §1.5.c.2, which states that Level 2 tanks exhibit a “reduced” potential for harm and not a “low” potential for harm. §1.5.c.2 also refers to “contents, location, and size.” ***We therefore suggest rewording §2.37 as follows:***

2.37. “Level 2 AST” means an AST or AST system that is considered to be a lower risk than a Level 1 AST based upon contents, location, or size. Additionally, a Level 2 AST is an AST that is not defined as a Level 1 or Level 3 AST system.

Regarding food or food-grade materials, spills containing large quantities of such materials can negatively impact human health or the environment. However, we also recognize DEP’s desire not to impose undue regulations on agricultural operations or other facilities that store food. We are concerned that defining all ASTs storing food-grade materials as Level 3 might overlook ASTs storing hydraulic fracturing fluid that is marketed as being formulated with food-grade ingredients. **For this reason, we support the new language in § 1.5.c.3.A.2, which clarifies that food and food-grade ingredients that would qualify for Level 3 tanks must be “used for human or animal consumption.”**

Finally, it is important to recognize that Level 2 tanks still present a risk of contaminating drinking water supplies. As demonstrated by the report released by the West Virginia Rivers Coalition and Downstream Strategies on January 15, thousands of tanks are located outside of zones of critical concern and source water protection areas, but are still within five miles of drinking water intakes. Also, almost half of all registered tanks are within 1,000 feet of a surface water. **Even though it is reasonable for certain requirements to be somewhat less onerous for Level 2 tanks, it is critical that Level 2 tanks continue to be strongly regulated under the AST Act. The proposed rule strikes an appropriate balance by continuing to regulate Level 1 and Level 2 tanks, and by requiring additional safeguards for Level 1 tanks.**

§ 1.5.c.3.A in the rough draft rule stated that Level 3 tanks must meet the requirements of § 3.1, 3.3, 3.5, 3.6, and 3.7, but the proposed rule only requires Level 3 tanks to meet the requirements of Sections 3.1, 3.3, 3.5, and 3.6. The section that Level 3 tanks are no longer required to meet is as follows:

3.6. Notification of Change in Service or Status. -- An owner of an AST or AST system who wishes to change its service or status shall submit to the Department, at least thirty (30) days prior to beginning the change in service or status, a completed AST Change in Service/Status Form prescribed by the Secretary.

While we understand DEP’s goal of minimizing the requirements for Level 3 tanks, we also suggest that DEP should be notified of changes in service or status for all ASTs, including Level 3 ASTs. **We therefore recommend that in the final rule, this section be included as a requirement for Level 3 ASTs, as it was in the rough draft rule.**

2. Definitions

First point of isolation

We support DEP's definition of "first point of isolation," but we suggest some refinements of the definitions.

This definition is very important, because SB 373 specifically references the "first point of isolation" in its definition of AST, which includes "...all ancillary aboveground pipes and dispensing systems up to the first point of isolation and all ancillary underground pipes and dispensing systems connected to the aboveground containers to the first point of isolation." § 22-30-3(1). **We strongly support DEP's definition of "first point of isolation" in the proposed rule. The definition is consistent with the language and intent of SB 373, which is for the rules to include not just the tanks themselves, but also the associated pipes and systems.**

While we support the definition, it is confusing as to whether each AST has a single "first point of isolation" or whether an AST may have more than one "first point of isolation." **We therefore suggest that DEP clarify the definition of "first point of isolation" in § 2.26.**

Mobile tank

The definition of "mobile tank" at § 2.44 was modified in the proposed rule. It now includes the sentence: "Tanks connected for more than 365 days without being disconnected and moved are not mobile tanks." This 365-day time period does not match the 60-day time period in the code at § 22-30-3(1) and § 22-30-25(a)(6), nor does it match the 60-day time period in the proposed rule at § 1.5.a.6. **We suggest that DEP reconcile and/or clarify these 365-day and 60-day time periods and make any necessary adjustments to the rule.**

3. Registration

We support DEP's rules regarding the registration of ASTs. The importance of the registration process is abundantly clear, now that we know more than 47,000 ASTs have registered across the state. DEP, public water utilities, emergency planners, and the general public now have the first full inventory of ASTs and can take steps necessary to minimize the risk that these ASTs will contaminate intakes and plan for contingencies, should contamination occur.

This section of the proposed rule references registration fees, and § 3.2 specifically mentions the Aboveground Storage Tank Fee Assessment Rule. Now that the original October 1 registration deadline has passed, **we seek clarity from DEP regarding its plans for determining and starting to charge these registration fees. In particular, what is DEP's plan for the Aboveground Storage Tank Fee Assessment Rule, and how soon will the fees start to be collected?**

Fees should be set as soon as possible 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. Additional staff positions should be created to manage the AST program, and funding them through registration fees is a sensible approach.

4. AST Certificates to Operate

We suggest that the proposed rule be modified to allow the Secretary to include site-specific conditions in the certificate to operate, when applicable, and to provide an opportunity for public notice and comment.

SB 373 requires these rules to implement a permitting system. Numerous sections of the AST Act refer to this permitting system. We understand that DEP intends to implement this permitting system using a “permit by rule” approach, via certificates to operate.

We understand DEP’s desire to implement permits in this way, in order to most efficiently use agency resources. But this approach has tradeoffs. Issuance of the certificate to operate appears to be based solely on information provided in the registration form (§ 4.1.a.1) or supplemental information requested by the Secretary (§ 4.1.a.2). The certificate appears not to be tied to the Spill Prevention Response Plan, the specific types of ASTs or chemicals, or the physical layout of the site or proximity of the site to a waterbody or a drinking water intake. It also does not appear to be tied to the tank level. **We suggest that the proposed rule be modified to allow the Secretary to include site-specific conditions in the certificate to operate, when applicable.**

We are also concerned that using certificates to operate does not provide any opportunity for public notice and comment on these permits. **No matter what permitting approach the agency ultimately decides to use, we suggest that an opportunity for public notice and comment be provided.**

We support the additional siting requirements in § 4.2.d for ASTs located within zones of critical concern, ASTs located on karst topography, and ASTs that pose a threat to public health and the environment.

5. Operation and Maintenance

We strongly support the detailed operation and maintenance requirements in this section, although we suggest some refinements.

Annual self-inspections and certifications (§ 5.3) are a critical aspect of the AST Act. **We support the proposed rule's approach that maintains these inspections for Level 1 and Level 2 tanks, but that only requires inspections every three years (Level 1) or every five years (Level 2) to be certified by a Professional Engineer (PE), API-certified inspector, or STI-certified inspector. While we understand the reason for omitting Level 3 tanks from these inspection requirements, we question whether a change to the code may be required to do so.**

Submission of Spill Prevention Response Plans (SPRPs) to DEP is also a critical aspect of the AST Act. In the event of an emergency, DEP needs this information readily available, and should not have to depend on finding the AST owner or operator and getting their cooperation in order to access the SPRP. **Simply maintaining SPRPs on-site is not sufficient. We agree with the proposed rule that SPRPs must be submitted to DEP (§ 5.6.a) and made a part of the public record, subject to the Freedom of Information Act.**

6. Reporting and Recordkeeping

We support this section, which pulls together in one place the required documents and information that must be kept onsite and provided to DEP.

7. Corrective Action

We support this section, which includes detailed requirements for corrective actions in response to confirmed or threatened releases.

8. AST Design, Construction and Installation

We support the detailed requirements in this section.

9. Corrosion and Deterioration Prevention

We support the detailed requirements in this section.

10. Release Prevention, Leak Detection and Secondary Containment

We support the detailed requirements in this section, but we suggest some refinements.

While the proposed rule addresses numerous practices that will minimize the risk of a release, the secondary containment requirements are different. Secondary containment is designed to prevent a spill from reaching groundwater or surface water. For this reason, the secondary containment requirements must be as stringent as possible. In many sections of the rule, if ASTs are certified as fit for service but deficiencies are noted, a timetable for upgrading is provided (December 31, 2015 for Level 1 tanks and June 30, 2016 for Level 2 tanks). For secondary containment deficiencies, the timetable is different: all deficiencies for Level 1 or 2 tanks need to be corrected within three months of the effective date of this rule (§ 10.2.m). **Due to the critical importance of secondary containment, we suggest that DEP require secondary containment deficiencies to be corrected on the effective date of this rule.**

Regarding double-walled ASTs serving as secondary containment, the proposed rule states that: “the piping, dispenser, and ancillary equipment would require secondary containment.” (§ 10.2.h) **We support this requirement but suggest that DEP provide further clarification as to the size of the secondary containment required for the piping, dispenser, and ancillary equipment.** An EPA memo on Use of Alternative Secondary Containment Measures at Facilities Regulated under the Oil Pollution Prevention Regulation (40 CFR Part 112), from Marianne Lamont Horinko, Assistant Administrator, to Oil National Policy Managers may be instructive (See <http://www.epa.gov/oem/docs/oil/spcc/contain.pdf>).

11. Nonoperational, Change in Service and Closures of AST Systems

We support the detailed requirements in this section.

12. Delivery Prohibition

Delivery prohibitions provide an important mechanism for enforcement of these rules, and we therefore support the detailed requirements in this section.

13. Bonding and Financial Assurance

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 therefore suggest 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 spilled.**

Thank you for your consideration of these comments.

Signed,

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