

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



## WVDEP Releases Draft Interpretive Rule on Aboveground Storage Tank Inspection, Certification, and Spill Prevention Plan Requirements

The West Virginia Department of Environmental Protection (WVDEP) has released a draft “[Interpretive Rule](#)” to implement certain inspection, certification, and spill prevention – response plan provisions of the Aboveground Storage Tank Act (AST Act) enacted earlier this year. The AST Act requires that all qualifying aboveground tanks (generally those with a capacity of 1,320 gallons or more) be inspected and certified as suitable for use by January 1, 2015. Owners of such tanks must also submit a “Spill Prevention Response Plan” to WVDEP by December 3, 2014.

The proposed rule creates three categories of tanks. Level 1 tanks are those that WVDEP believes “have the potential for high risk of harm to public health or the environment[.]” Level 1 includes tanks that are: (1) in a “zone of critical concern” (close to a public water supply intake on a stream) or near a water well or spring that supplies public water; (2) contain “hazardous substances” as defined by the federal Comprehensive Environmental Response, Compensation and Liability Act (also known as the “Superfund” law); or (3) have a capacity of 50,000 gallons or more. Level 3 tanks are those that WVDEP determines to have a low risk of harm to the public’s health or environment because of their contents or location, or their coverage under another “strict” regulatory program. All tanks subject to the AST Act, not designated as either Level 1 or Level 3, will be considered Level 2 tanks (as well as other tanks specifically designated as Level 2 by the WVDEP).

Under the proposed Interpretive Rule, each tank category has different requirements for the initial inspection and certification that must be completed by January 1, 2015. Level 1 tanks must be inspected and certified by at least one of the following persons: (1) a professional engineer; (2) someone working under the direct supervision of a professional engineer; or (3) a person certified to perform tank inspections by the American Petroleum Institute or Steel Tank Institute. Level 2 and Level 3 tanks may be inspected and certified by the owner or operator of the tank, or a person designated by the tank owner or operator. Regardless of tank level category, the inspections must be conducted “in accordance with the industry standard appropriate to the tank or tank facility” and meet other minimum inspection requirements established by the rule. The proposed rule incorporates by reference inspection standards adopted by 11 different industry groups, including the American National Standards Institute (ANSI) and the National Fire Protection Association.

The contents of the Spill Prevention Response Plan that must be submitted to WVDEP by December 4, 2014 also vary by tank category. Level 1 tanks require a site specific plan that conforms to the requirements set forth in Appendix C of the proposed rule and the AST Act.

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If a Level 2 tank is already governed by certain other permits issued by WVDEP that require a Groundwater Protection Plan (e.g. mining permits, water discharge permits, oil and gas permits, and others), the tank owner or operator may submit the Groundwater Protection Plan to WVDEP in lieu of a separate Spill Prevention Response Plan. WVDEP may, however, require submission of additional information to ensure such plans comply with the AST Act. Similarly, the owner or operator of a Level 2 tank already is required to maintain a spill prevention plan under certain West Virginia or federal laws (also known as SPCC plans). The owner or operator may submit a SPCC plan in lieu of a site specific Spill Prevention Response Plan if the plan meets certain requirements of the proposed rule.

For any Level 3 tank required to have an Emergency Response Plan pursuant to the federal Bioterrorism Act of 2002, that plan may be submitted in lieu of a site-specific Spill Prevention Response Plan.

The proposed Interpretive Rule addresses only the initial inspection and certification requirements; it does not address subsequent tank inspections or certifications. However, based on recent public statements by WVDEP Secretary Randy Huffman, the emergency and proposed legislative rules that the WVDEP will issue later this year will likely contain very similar if not identical provisions. Likewise, the WVDEP's draft Interpretive Rule does not address whether tanks statutorily exempted from the permit requirement must nevertheless comply with all the performance standards established by the AST Act.

During a recent presentation at a West Virginia Chamber of Commerce event, WVDEP Director of the Division of Water and Waste Management, Scott Mandirola, indicated that the agency was considering a proposed rule that would require tank inspections and certifications every three to five years after the initial inspection depending on the tank level classification. Director Mandirola also remarked that WVDEP may propose a rule to exempt from the performance standards tanks not required to obtain a permit under the AST Act.

WVDEP will accept public comments on the proposed Interpretive Rule for the next 30 days culminating with a public hearing on October 9, 2014 at 6:30 p.m. at WVDEP's headquarters in Kanawha City.

If you have any questions or concerns about the WVDEP's proposed regulation, or the AST Act, please contact Robert M. Stonestreet at (681) 205-8888 or [rstonestreet@babstcalland.com](mailto:rstonestreet@babstcalland.com), or Christopher B. Power at (681) 205-8888 or [cpower@babstcalland.com](mailto:cpower@babstcalland.com).