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Subject: Comments on Administration of the Storage Tank and Spill Prevention Act

Attached please find the PA Chamber's comments on DEP's proposed changes to the Administration of the Storage Tank and Spill Prevention Act. Please feel free to contact me if you have any questions. We would welcome the opportunity to discuss these comments with you.

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**PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY
COMMENTS REGARDING PROPOSED AMENDMENTS TO THE
STORAGE TANK AND SPILL PREVENTION ACT REGULATIONS**

I. Introduction

On April 22, 2006, the Environmental Quality Board (“EQB”) published for public comment proposed amendments to Pennsylvania’s storage tank regulations. See 36 Pa. Bull. 1851 (April 22, 2006). The storage tank regulations implement the requirements of the Pennsylvania Storage Tank and Spill Prevention Act (the “Storage Tank Act”), 35 P.S. §§ 6021.101 – 6021.2104, and are codified at 25 Pa. Code Chapter 245. The state initially adopted the storage tank regulations in 1991 and significantly amended the regulations as the program evolved. Since 1997, however, many of the provisions of the storage tank regulations have not been modified.

Storage tanks have been a focal point for regulation since the 1980s. In 1988, the United States Environmental Protection Agency (“EPA”) promulgated regulations codified at 40 C.F.R. Part 280 governing the installation, registration, use and closure of underground storage tanks (“USTs”) pursuant to the Resource Conservation and Recovery Act (“RCRA”). The following year, Pennsylvania enacted the Storage Tank Act to provide statutory authority to regulate both USTs and aboveground storage tanks (“ASTs”). Because of a potential overlap and competition between federal and state regulation of USTs, Pennsylvania applied for and received approval from EPA in 2003 to administer the state UST regulations in lieu of the federal program. See 66 Fed. Reg. 53520 (Sept. 11, 2003). The federal government codified this approval in an immediate final rule effective May 16, 2006. See 71 Fed. Reg. 13769 (March 17, 2006).

By contrast, the components of Pennsylvania’s storage tank regulations governing ASTs do not have a federal regulatory analogue. Instead, Pennsylvania created an independent program to regulate ASTs with many similarities to the UST regulations.

The proposed amendments to Pennsylvania’s storage tank regulations affect a broad array of requirements. Because of the widespread use of storage tanks in Pennsylvania, a large number of regulated entities, ranging from small businesses to large multinational corporations, will be affected by these amendments. The Pennsylvania Chamber of Business and Industry (“PCBI”), is the largest broad-based business association in Pennsylvania. Our thousands of members statewide represent over 50% of the private workforce. Through our members and Solid Waste Advisory Committee, PCBI reviewed the proposed storage tank regulatory amendments and offers the comments set forth below.

II. Discussion

A. Definition of “Regulated Substances”

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The amended definition of "regulated substance" in 25 Pa. Code § 245.1 is a significant concern for members of PCBI for several reasons. First, through incorporating by reference nonpetroleum substances listed in 34 Pa. Code Chapter 323 ("Chapter 323"), the amendment would add over 400 chemicals to the list of regulated substances. PCBI recognizes that these substances may present environmental hazards to varying degrees; however, the substantial increase in the number of regulated substances would adversely impact the resources of both the Pennsylvania Department of Environmental Protection ("DEP") and the regulated community in implementing the storage tank program.

Second, the proposed definition provides that if any of these 400 substances do not have a CERCLA reportable quantity, then a one-pound reportable quantity is assigned by default. Without any cost/benefit analysis or technical justification, this one pound requirement appears arbitrary and will be needlessly expensive.

Third, this amendment does not limit the applicability of the newly added regulated substances to certain categories of storage tanks. This wide-ranging applicability will also result in an unnecessary expenditure of resources. The EQB, if it finds scientific or technical justification to adopt the part or all of the Chapter 323 substances, should instead consider applying the Chapter 323 substances only in regulating large ASTs (similar to the regulation of oil used for heating) and USTs. Regardless, a cost/benefit analysis should be provided to justify the addition of these substances.

Fourth, by incorporating Chapter 323 by reference, the EQB would effectively relinquish control over this portion of the regulated substances list to the detriment of both the EQB and the regulated community. Pursuant to Act 275 of 1970, Section 1920-A of the Administrative Code of 1929, 71 P.S. § 510-20, the EQB was established to formulate, adopt and promulgate rules and regulations necessary for the proper work of DEP. Chapter 323, however, is promulgated by the Department of Labor and Industry, which may modify this list without EQB consent. Therefore, the regulated substances under Chapter 323 should be directly incorporated into Chapter 245, rather than incorporated by reference, to ensure continued and active oversight by the EQB.

Fifth, given the broad scope and potentially significant impact involved in bringing some 400 Chapter 323 substances within the purview of the storage tank program, these substances should have been individually identified within the proposed rulemaking package to ensure that all sectors of the regulated community, including both large and small tank owners and operators, were fully aware of and able to review and comment on this issue. Accordingly, the EQB should consider revising and republishing the proposal with a specific listing of the Chapter 323 substances.

If the EQB does move forward with incorporating the list of substances in Chapter 323 despite all the concerns raised above, PCBI supports the temporary exclusion and phase-in period for newly regulated tanks provided for in 25 Pa. Code §§ 245.403, .505 and .605.

B. Incorporation of Technical Documents

In two instances, the proposed rulemaking would incorporate by reference procedures found in DEP technical documents, including “Verification of Emergency Containment Structures for Aboveground Storage Tanks” proposed for § 245.542(d)(2)(ii), and “Closure Requirements for Aboveground Storage Tank Systems” proposed for § 245.561(3). The incorporation of guidance or technical documents within this regulation is of concern to PCBI because the opportunity for external review and comment on such documents is much more limited than is the case with actual regulations. For instance, proposed and final EQB rulemakings are subject to review by legislative standing committees and the Independent Regulatory Review Commission, which can represent important checks on a regulation’s consistency with legislative intent, reasonableness, and cost-effectiveness; technical documents do not receive these levels of review. Thus, particularly once this rulemaking is promulgated in final form, external scrutiny on subsequent changes to these technical documents—which will effectively have the force of regulations—may be curtailed. In addition, referring to technical documents to provide acceptable industry test methods, as would be the case for permeability testing in § 245.542(d)(2)(ii), would be inconsistent with other aspects of the rule in which industry methods are incorporated directly into the regulation itself. Accordingly, references to technical documents in the rule should be removed and, if necessary, replaced with substantive provisions. Additionally, the DC Circuit has decided de facto regulation via “guidance” is impermissible. See *Appalachian Power Co. v. EPA*, DC Circuit, 04-14-00.

At a minimum, PCBI believes that to the extent references to technical documents remain in the rulemaking, the language “unless otherwise agreed upon or waived by the Department,” presently included with the proposed AST closure technical document reference in § 245.561(3), should also be added to the proposed AST emergency containment verification technical document reference in § 245.542(d)(2)(ii). A similar waiver provision should also be added to any existing provision of Chapter 245 that incorporates a DEP technical document, such as § 245.453(a) with respect to UST closure. Although the use of this waiver language in conjunction with the incorporation of technical documents still subjects DEP decision-making to far less scrutiny than if the substantive requirements were enumerated in the regulatory sections themselves, the waiver language would give regulated persons some additional flexibility on a case-specific basis.

C. Replacement of Existing Tank with New Tank

An exemption should be provided under Title 25 Chapter §245.231 when a new tank replaces an existing tank at the same location. Particularly when the tank status is the same and the location is the same.

The Pennsylvania Department of Environmental Protection (Department) needs to consider a more streamlined approach for this process. Under the current process the facility tank owner must permanently close the existing tank in accordance to Title 25 Chapter §245.561. This causes unnecessary and valueless administrative burdens that weigh on both the Department’s and the facilities’ resources. For instance, an “Aboveground Storage Tank System Closure Notification Form” must be completed then

filed with the Department; a Storage Tanks Registration / Permitting Application Form must be completed and then filed with the Department. Then an analysis of soil conditions both under and around the tank location must be conducted and submitted to the Department in an AST Closure Report Form, Sections I, II, and III. All these steps seem ludicrous when a new tank is going to be installed at the same location. Then prior to constructing the new tank there are the additional burdens of completing, submitting, reviewing a "Site Specific Installation Permit" and furthermore completing, submitting, and reviewing yet another "Storage Tanks Registration / Permitting Application Form" to apply for a new registration number. All of the aforementioned administrative processes delay the progress of installing a new more environmentally sound tank. All these administrative burdens could be eliminated by simply recording/reporting the tank change on the "Storage Tanks Registration / Permitting Application Form".

D. Replacement of UST Piping Systems

The EQB's proposed amendment to § 245.421(b)(2) would require upgrading of all piping associated with a UST system to satisfy secondary containment standards whenever more than 30% of the system piping is going to be replaced. PCBI believes that the proposal should allow for an alternative compliance method based on evidence of piping manufacturer or installer financial responsibility. Provision of this alternative compliance method would be consistent with § 1530 of the Energy Policy Act of 2005, which amends the federal UST program at subchapter IX of the Solid Waste Disposal Act, and the draft U.S. Environmental Protection Agency ("EPA") guidance document issued to implement this amendment entitled "Grant Guidelines to States for Implementing the Financial Responsibility and Certification Provision of the Energy Policy Act of 2005," no. EPA-510-D-06-002 (May 2006). Proceeding consistent with the federal approach on this issue should be sufficiently protective of possible releases from existing UST piping, while at the same time allowing the regulated community flexibility in applying resources to comply with the full range of storage tank program requirements.

Also, to the extent feasible consistent with federal requirements for authorized state UST programs, PCBI suggests that the EQB consider treating the substitution of existing UST piping with identical materials as not constituting piping "replacement" and so avoiding triggering the need for upgrading to secondary containment.

E. AST Overfill Prevention Requirements

The proposed amendment of § 245.541(e) would mandate upgrading, within three years of adopting this rulemaking, to a high-level alarm with cut-off device or manned operator shutdown procedure for existing AST systems not otherwise taken out of service for a scheduled inspection or modification. To provide AST owners and operators with some flexibility in implementing this requirement, PCBI suggests that the provision allow the use of a visual gauge, instead of a high-level alarm, for ASTs with a manned operator shutdown procedure. In the experience of PCBI members, visual gauges have successfully prevented overfills at ASTs with manned operations, and avoid the expense

and safety concerns involved in emptying and cleaning ASTs prior to installing high-level alarms. Accordingly, PCBI concludes that requiring upgrading to high-level alarms on manned operator ASTs, outside of a removal from service, is not necessary.

F. Temporary Out of Service Extension

A provision for extensions to tanks "Temporary Out of Service" should be provided under Title 25 Chapter §245.562.

There are currently three approaches to comply with the temporary out of service status for aboveground tanks. One approach is that the tank could be inspected in accordance to Title 25 Chapter §245.562(e) while in temporary out of service status. Another approach is that the tank could be permanently closed in accordance to Title 25 Chapter §245.562(f). Still another approach is that a variance from both §245.562(e) and §245.562(f) can be requested where the variance demonstrates that there is an alternative that provides equal or greater protection to human health and the environment.

The inspection approach either an "out of service" or "in service" inspection in accordance to Title 25 Chapter §245.553 or Title 25 Chapter §245.552 respectively is not the most technically sound approach to assure that tank's overall integrity is satisfactory when the tank is returned to service at some later date. This approach does not fully protect the environment. Under this approach, a facility could conduct an "Out of Service" inspection today and if it passes leave the tank empty for 19 years without a requirement to inspect the tank bottom again. While the facility maintains its inspection schedules in accordance to §245.553 and §245.552 product could be put into the tank 19 years from now then leak from the tank bottom because it has corroded while unused.

Taking the permanent closure approach provides un necessary and valueless administrative burdens that weigh on both the Department's and the facilities' resources. For instance, to permanently close an aboveground storage tank an "Aboveground Storage Tank System Closure Notification Form" must be completed then filed with the Department; a Storage Tanks Registration / Permitting Application Form must be completed and then filed with the Department. Then an analysis of soil conditions both under and around the tank must be conducted and submitted to the Department in an AST Closure Report Form, Sections I, II, and III. All these steps would be ludicrous because the tank is intended to be used in the future. In accordance to a permanent closure process the tank no longer exists administratively yet physically the tank still exists and intends to be used. Hypothetically, if a facility conducted the permanent closure then when it puts the tank back into service both the Department and the facility have yet additional burdens of completing, submitting, reviewing a "Site Specific Installation Permit" and furthermore completing, submitting, and reviewing yet another "Storage Tanks Registration / Permitting Application Form" to apply for a new registration number. All of the aforementioned administrative processes would be ludicrously conducted for a

tank that is sitting empty and harmless to human health and the environment in its current condition.

The most logical approach is to provide an extension to "Temporary Out of Service" (TOS) status by complying with §245.562(a)(b)(c)(d) then conduct an out service inspection in accordance to §245.553 immediately before the tank is removed from TOS and returned to service. While the tank is in TOS it is not posing any threat to the environment or human health. It is empty and blanked from receiving product. This approach provides the most immediate tank integrity data with the highest level of assurance that the tank is sound before returning to service. This approach provides the most immediate and greatest level of human health and environmental protection.

III. Conclusion

In closing, this proposal represents a significant effort in updating and clarifying the storage tank program regulations. However, a number of practical and implementation issues still need to be addressed. To summarize, PCBI first suggests providing cost/benefit analysis to justify the addition of over 400 Department of Labor and Industry-regulated chemicals to the list of storage tank program regulated substances. Additionally, the substances should be directly incorporated into Chapter 245 to maintain EQB oversight and to ensure that the regulated community is fully aware of and able to review and comment on the substances. Second, references to technical guidance documents should be replaced with substantive provisions to ensure full external review and comment on any changes to these requirements. Third, the replacement of UST piping systems should allow for an alternative compliance method consistent with federal requirements. Lastly, PCBI suggests that the AST overfill prevention requirements allow for the use of a visual gauge instead of a high-level alarm in light of successful experience at manned AST operations.

PCBI and its membership appreciate the opportunity to provide these comments and look forward to working with the EQB as efforts to improve the storage tank program progress.

