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PA Chamber™ of Business and Industry

417 Walnut Street
Harrisburg, PA 17101
717 255-3252 / 800 225-7224
FAX 717 255-3298
www.pachamber.org

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Mr. Kris Shiffer, Chief
Division of Storage Tanks
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
P.O. Box 8762
Harrisburg, PA 17105-8762

RE: Administration of the Storage Tank and Spill Prevention Program (Chapter 245) Proposed Rulemaking

I am writing on behalf of the Pennsylvania Chamber of Business and Industry (PA Chamber), the largest, broad-based business advocacy organization in the Commonwealth. Our nearly 10,000 member companies are involved in all industrial categories and are of all sizes. On behalf of these businesses, we welcome the opportunity to respond to the Department's invitation for public comments concerning the development of 25 Pa. Code Ch. 245 Administration of the Storage Tank and Spill Prevention Program rulemaking, as published in the Feb. 24, 2018 issue of the Pennsylvania Bulletin (48 Pa.B. 1101).

Broadly speaking, as a matter of policy the PA Chamber advocates for the enactment of regulatory policies that:

- are based on sound science and a careful assessment of environmental objectives, risks, alternatives, costs, and economic and other impacts;
- set environmental protection goals, while allowing and encouraging flexibility and creativity in their achievement;
- allow market-based approaches to seek attainment of environmental goals in the most cost-effective manner;
- measure success based on environmental health and quality metrics rather than fines and penalties;
- do not impose costs which are unjustified compared to actual benefits achieved; and
- do not exceed federal requirements unless there is a clear, broadly accepted, scientifically-based need considering conditions particular to Pennsylvania; an develop a private-public relationship which promotes working together to meet proper compliance.

In view of these tenets, the PA Chamber offers the following comments and appreciates the Department's consideration of them.

The Final Rule Should Be Developed with the Goals of Avoiding Duplicative Requirements and Defining Clear Environmental Benefits from New Requirements

From a general perspective, we support Pennsylvania's efforts to retain primacy over the federal requirements relating to the underground storage tank ("UST") program contained in 40 C.F.R. Part 280. Satisfying one set of regulatory requirements rather than potentially confronting dueling federal and state requirements is generally beneficial to the regulated community and helps streamline the administration and enforcement of such requirements. We concur that a significant number of the proposed changes to

Chapter 245 appear to be designed to update Chapter 245 in light of the recent changes to 40 C.F.R. Part 280.

By contrast, there are also a significant number of changes in Chapter 245 that appear to be wholly divorced from the modifications to the federal UST program. In certain instances, these types of changes to Chapter 245 reflect the collective experience that the Pennsylvania Department of Environmental Protection ("PADEP") and the regulated community have gained through implementing the STSPA over the past almost 30 years in connection with thousands of USTs and aboveground storage tanks ("ASTs") in Pennsylvania and will strengthen the regulations in important ways. In a number of other instances, however, the proposed changes will simply add to the regulatory burdens that owners and operators of regulated storage tanks are already shouldering in Pennsylvania with little apparent benefit. In addition, time lines for actions are being shortened in many instances.

The preamble to the proposed changes to Chapter 245 contains an extensive list of new notification, reporting and paperwork requirements that will be triggered by the proposed changes to Chapter 245 along with a long list of new forms and revisions to existing forms that will need to be developed and implemented. It is unclear from the cost-benefit analysis that has been provided whether the additional regulatory burdens that Chapter 245 will impose on the regulated community have been properly and fully evaluated and whether many of the changes will actually produce meaningful environmental benefits. Long experience with multiple environmental regulatory programs amply demonstrates that merely adding additional layers of paperwork and record-keeping requirements does not necessarily translate into greater environmental protection. We strongly recommend that PADEP together with the EQB identify the specific environmental protection objectives that are to be achieved through each new or added paperwork, reporting or notification requirement contained in Chapter 245 and objectively assess whether such requirement meaningfully contributes to achieving those environmental protection objectives.

Given Existing Stringent NRC Requirements, DEP Should Follow EPA's Lead and Afford Continued Exemption of Nuclear Power Generation Facilities' Underground Storage Tank Systems (UST) and of Emergency Generators

In 2015, the federal Environmental Protection Agency finalized a rulemaking (80 Fed. Reg. 41566) updating federal requirements for underground storage tanks. In its rulemaking proceeding, EPA determined that existing Department of Energy and Nuclear Regulatory Commission requirements (10 CFR 50) for nuclear power generation facilities were comparable in scope, intent and effectiveness to the EPA's desired outcomes, and, out of concern for duplicative regulation, provided a partial exclusion for UST systems at nuclear facilities (specifically for Subparts B, C, D, E and G). The 2015 federal rule also retained applicability of Subpart F (regarding release response and corrective action), expanded exclusion for such UST systems for newly adopted Subparts J and K, and retained a provision of Subpart H regarding financial responsibility requirements. We encourage DEP in its final rulemaking in this matter to retain the partial exclusion for these systems, as they are already effectively regulated by federal DOE and NRC requirements, and to make clear that it is interpreting 40 CFR 80 to only apply to the installation of new tanks. To wit, DEP should make clear that only PA Code 245 Subchapter D applies to nuclear facilities' tanks and emergency diesel generator USTs.

The Proposed Changes to the Definition of a Reportable Release Should Not Be Included in the Final Rulemaking

DEP in the proposed revised language in 245.1 and 245.305 proposes to declare that "all releases into a containment structure or facility pose an immediate threat of contamination of soils, subsurface soils, surface water or groundwater." 245.1 notes that there is only one exception to this blanket declaration – "release of a regulated substance into a liquid-tight containment sump or emergency containment structure as a result of a tank handling activity, if the certified installer providing direct onsite supervision has control over the regulated substance, the regulated substance is completely contained and, prior to the certified installer leaving the storage tank facility, the total volume of the regulated substance is recovered and removed." Section 245.305(i) then specifically identifies the four criteria that must be met to not constitute a reportable release: "1) the owner or operator has control over the release; 2) the release is completely contained; 3) the total volume of the release is recovered and removed within 24 hours of the release; and 4) any defective storage tank system component that caused or contributed to the release is properly repaired or replaced." These two sections are inconsistent with one another. The definitional language in 245.1 does not contain the 24-hour time limit for removal or the requirement to repair or replace defective system components. If a release is completely contained and under control by the operator (and has not escaped from the containment system -- i.e., items #1 and 2 above are met), then it stands to reason the release does in fact not pose a threat to soil or water. Further, it may not be possible given logistics involved to have the material in containment removed within 24 hours. DEP does not identify how soon the defective component must be replaced in order for the release to not be reported.

A key element of the requirements that currently apply to regulated ASTs and USTs is that they employ secondary containment. Secondary containment serves as an additional layer of protection to prevent regulated substances being held in regulated tanks from reaching the environment (e.g., soils, groundwater or surface water). By design, secondary containment keeps regulated substances out of the environment.

Both federal and state release reporting requirements are generally predicated on the concept that for a release to be reportable, it needs to reach the environment. The proposed changes to Chapter 245 largely eviscerate this concept. 25 Pa. Code § 245.1 currently defines a "release" as follows:

> Spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into surface waters and groundwaters of this Commonwealth or soils or subsurface soils in an amount equal to or greater than the reportable released quantity determined under section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C.A. § 9602), and regulations promulgated thereunder, or an amount equal to or greater than a discharge as defined in section 311 of the Federal Water Pollution Control Act (33 U.S.C.A. § 1321), and regulations promulgated thereunder. The term also includes spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into a containment structure or facility that poses an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater.

This provision already "pushes the envelope" in that it treats as a release a situation where regulated substances enter a containment structure in a manner such that the regulated substances pose an immediate threat of contamination of soils, subsurface soils, surface water or groundwater. The rationale for this element of the definition of a release is grounded in the recognition that reporting an incident as a release may be appropriate where the secondary containment system is in imminent danger of failure such that regulated substances are posing an immediate threat of entering the environment. The "immediate

threat" standard is not met, however, where secondary containment is functioning as it should (i.e., it is keeping the release from a tank system from entering the environment).

In the proposed changes to Chapter 245, PADEP largely ignores the functionality of secondary containment. The proposed changes to the definition of a "release" automatically classify entry of a regulated substance into a containment structure or a facility as an "immediate threat" thereby meeting the definition of a release except in very narrowly circumscribed circumstances. Specifically, the amended definition of a "release" includes the following language:

> All spills, leaks, emissions, discharges, escapes, leaching or disposals of a regulated substance into a containment structure or facility pose an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater, except when a regulated substance is present in a liquid-tight containment sump or emergency containment structure as a result of a tank handling activity, if the certified installer providing direct onsite supervision has control over the regulated substance, the regulated substance is completely contained and, prior to the certified installer leaving the storage tank facility, the total volume of the regulated substance is recovered and removed.

This language is overly broad. Rather than creating a presumption that any escape of a regulated substance into secondary containment constitutes a release, it would far more helpful to identify by way of example those limited circumstances where the presence of a regulated substance in secondary containment actually poses an "immediate threat" to environmental media.

Proposed changes to 25 Pa. Code § 245.305 compound the problems noted above. While the definition of a "reportable release" and its important exceptions have been eliminated from Chapter 245, some of the concepts from the definition of a reportable release have reappeared in 25 Pa. Code § 245.305(i). However, the proposed language is overly restrictive. For example, it appears that PADEP and the EQB contemplate as a predicate to being insulated from release reporting requirements that "any defective storage tank system component that caused or contributed to the release is properly repaired or replaced" within 24 hours. Such repairs may take far longer to accomplish than 24 hours but may pose no additional risks to the environment because other measures are occurring. Similarly, the volumetric exceptions that were contained in the definition of a reportable release (25 gallons for petroleum and reportable quantities for hazardous substances) were based on quantities of regulated substances reaching "an aboveground surface." The proposed language in 25 Pa. Code § 245.305(i) requires that amounts of petroleum and regulated substances reaching secondary containment be counted for purposes of the foregoing quantities. This twist in the proposed regulatory language will effectively eliminate the exceptions to release reporting where secondary containment is functioning as it is supposed to.

We believe that the proposed changes to release reporting obligations under Chapter 245 go well beyond current requirements and are inconsistent with the basic framework of release reporting requirements under federal and state law. We respectfully request that the proposed changes be withdrawn.

DEP Should Make Additional Clarifications to the Proposed Rulemaking

DEP should also define "liquid-tight," a descriptor in 245.303 of what type of a structure or system may be eligible for DEP to waive or combine certain regulatory requirements. 245.305.b proposes that operators report to DEP "the cause of the release." In many cases, an investigation is necessary to

determine the cause of the release; as such, 245.305.b should be written such that reported release notifications should include the "reasonably suspected cause of the release."

245.402 should be amended to clarify that it applies to underground storage tanks systems; the adjective "underground" was not included in the proposed language.

245.513.b.2.v proposes monthly inspection of cathodic protection systems. The PA Chamber believes this is an unduly burdensome requirement, with costs likely to exceed benefits. The PA Chamber proposes DEP move to a quarterly or semi-annual inspection requirement.

245.541 should place the burden for the prevention of spills and overflows during delivery of fuels on the delivering company, not the operator of the receiving tank.

245.132 as proposed will mandate that certified companies, certified installers and certified inspectors report to PADEP in circumstances where a regulated substance is observed in a containment structure or facility. As noted above, this type of requirement extends well beyond existing reporting requirements and is divorced from any analysis of whether the presence of a regulated substance in a containment structure is posing any significant threat to the environment.

Wastewater tank systems have been excluded from the universe of USTs that are regulated under Chapter 245. The proposed changes to Chapter 245 include limiting language that provides that to be excluded, wastewater tank systems must be part of a water treatment facility that is either regulated under the national pollutant discharge elimination system ("NPDES") permitting program or the industrial wastewater pretreatment program pursuant to the federal Clean Water Act. These limitations may leave certain wastewater tank systems subject to regulation under Chapter 245 for the first time. For example, wastewater systems may discharge to publicly-owned treatment works ("POTWs") that do not have pretreatment programs in place. Wastewater systems discharging to POTWs may also not be covered by pretreatment programs. In circumstances that do not involve discharges to POTWs, wastewater systems may be operated in ways that do not trigger the NPDES permitting program (such as discharges utilizing spray irrigation systems). The scope of (presumably) unintended consequences from the proposed change identified above is large. We suggest that the proposed change be eliminated.

The Proposed Revisions to the Corrective Action Process and New Periodic Testing Requirements Should be Withdrawn from the Final Rule

The proposed version of Chapter 245 includes various new reporting requirements that mandate that the owner or operator of a regulated storage tank notify PADEP by telephone or electronic mail "as soon as practicable, but no later than 24 hours" after the following events:

- initiation of "interim remedial actions;"
- provision of an alternate source of water to the owner of the affected or diminished water supply; and
- initiation of site characterization activities.

Chapter 245 already includes provisions establishing timeline for activities relating to the corrective action process. The additional notification requirements simply add further layers of procedural

requirements without serving any beneficial purposes. PADEP can certainly establish expectations regarding communications concerning an incident once the initial release report has been made. The type of immediate reporting of the kind of activities described above is unlikely to change in any material manner the way in which response actions are being conducted. We respectfully request that these additional notification requirements be eliminated.

In addition, amendments are proposed to 25 Pa. Code § 245.311 that mandate that a remedial action plan must be submitted "prior to its implementation." This new requirement may create problems for both PADEP and remediators. Interim response actions may blend smoothly into remedial actions making it difficult to distinguish precise lines of demarcation where one begins and the other ends. Moreover, PADEP and the person conducting remediation may decide that it makes sense to move ahead with remedial actions even while a remedial action plan is being prepared. For example, it may make little sense to delay remedial actions to reduce the further spread of regulated substances while a formal remedial action plan is prepared. We suggest that this provision be removed.
As indicated above, we understand that many of the new inspection and testing requirements are being promulgated because of the 2015 revisions to 40 C.F.R. §§ 280.35 and 280.36. However, it appears that the requirement at 25 Pa. Code § 245.437(a)(3) to test the electronic and mechanical components of release detection equipment at least annually goes beyond the corresponding federal requirements. Furthermore, because the new requirements at 25 Pa. Code § 245.438(a)(1)(ii) require an inspection of release detection equipment to ensure proper operation at least every 30 days, as well as a review of test records for release detection equipment at least every 30 days, we believe the proposed annual testing requirement for the same equipment is redundant and unnecessary. Because of the substantial additional financial, recordkeeping, and reporting burdens that are being imposed on the regulated community as a result of the proposed changes to Chapter 245, we believe that including additional, unnecessary requirements is ill-advised.

DEP Must Amend Its Proposed Regulatory Rulemaking Documents to Satisfy the Requirements of the Regulatory Review Act

Section 5(a)(4) of the Regulatory Review Act obligates agencies proposing regulations to submit to the Independent Regulatory Review Commission a Regulatory Analysis Form that, among various other components, includes "estimates of the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector."

The Regulatory Analysis Form contained in the EQB's proposed rulemaking, as published for its October 2017 meeting, did not contained any estimates of cost to the private sector. Further, Section F of the proposed rulemaking (as published in 48 Pa.B. 1101) which describes costs, benefits and compliance, does not provide a proper accounting (or even an attempt to estimate the costs) for the significant increase in labor that will be necessary to satisfy the various proposed increased inspection, monitoring, supervising and recordkeeping requirements. DEP notes in the RAF two key reasons it is proposing this rulemaking is "releases from piping and spills and overflows associated with deliveries" and "release detection equipment is only detecting approximately 50 percent of the releases it is designed to detect." In response to these concerns, DEP is proposing substantial additional regulatory criteria on the public sector, including obligating the company receiving delivery to monitor the offtake of fuels into the tank. It is not clear from the Department's documents or the minutes from the Storage Tank Advisory Committee if the Department has determined if many companies currently have dedicated personnel to observe the

delivery of fuels as part of their standard operating procedure. DEP's cost discussion in the RAF does not estimate what it would cost the companies who do not currently monitor delivery, or if this monitoring would yield improved performance on the part of the delivery companies. Further, the cost discussions in the RAF and Section F do not estimate, to the degree necessary to satisfy the Regulatory Review Act, what additional DEP staffing and resources will be needed to implement this substantially more stringent regulatory program, nor do the cost discussions estimate or attempt to estimate the cost to the private sector for the significant amount of increased inspections, monitoring and record-keeping being proposed.

As such, DEP should revise Subchapter F and the RAF to better account for the costs to the Department and the private sector to implement the proposed provisions of Subchapter 245, republish the documents, and offer another comment period with a notice to the public and stakeholders asking specifically for cost estimates for the various proposed additional regulatory obligations. The lack of a good faith effort to document estimated costs to the Commonwealth and private sector, as obligated by the Regulatory Review Act, will constitute a substantial defect to any final rulemaking.

Sincerely,

Kevin Sunday
Director, Government Affairs