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**Kathy Cooper**

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**From:** ecomment@pa.gov  
**Sent:** Tuesday, March 27, 2018 9:03 AM  
**To:** Environment-Committee@pasenate.com; IRRRC; eregop@pahousegop.com; environmentalcommittee@pahouse.net; regcomments@pa.gov; apankake@pasen.gov  
**Cc:** c-jflanaga@pa.gov  
**Subject:** Comment received - Proposed Rulemaking: Administration of the Storage Tank and Spill Prevention Program



**Re: eComment System**

**The Department of Environmental Protection has received the following comments on Proposed Rulemaking: Administration of the Storage Tank and Spill Prevention Program.**

**Commenter Information:**

Michael Meloy  
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**Comments entered:**

Please accept on behalf of Manko, Gold, Katcher & Fox, LLP comments attached hereto regarding proposed amendments to 25 Pa. Code Chapter 245. Please do not hesitate to contact us if you should have any questions regarding the attached comments.

We appreciate the opportunity to provide comments regarding these important regulatory changes.

Michael

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These links provide access to the attachments provided as part of this comment.

Comments Attachment: [MankoGoldKatcher&FoxComments on Proposed Amendments to Storage Tank Regulations \(3-26-18\).pdf](#)

Please contact me if you have any questions.

3199

**MANKO | GOLD | KATCHER | FOX** LLP RECEIVED  
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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2018 MAR 27 A 9:10

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March 26, 2018

Via Electronic Mail

Kris Shiffer, Chief  
Division of Storage Tanks  
Pennsylvania Department of Environmental Protection  
Rachel Carson State Office Building  
400 Market Street  
Harrisburg, PA 17101

\*Partner responsible – John F. Gullace  
\*\*Partner responsible – Brenda H. Gotanda

Re: Proposed Amendments to Regulations Implementing the Storage Tanks and Spill Prevention Act

Dear Mr. Shiffer:

On February 24, 2018, the Pennsylvania Environmental Quality Board (“EQB”) published a notice in the Pennsylvania Bulletin soliciting public comments regarding proposed substantive revisions to the current version of 25 Pa. Code Chapter 245: Administration of the Storage Tank and Spill Prevention Program (“Chapter 245”). 48 Pa. Bull. 1101 (Feb. 24, 2018). Chapter 245 implements requirements under the Pennsylvania Storage Tank and Spill Prevention Act (“STSPA”). The notice in the Pennsylvania Bulletin invited submission of comments regarding the proposed changes to Chapter 245 until March 26, 2018. The purpose of this submission is to provide comments prepared by Manko, Gold, Katcher & Fox, LLP (“MGKF”) regarding the proposed changes to Chapter 245.

Many of the proposed changes to Chapter 245 were prompted by revisions to the federal underground storage tank regulations at 40 C.F.R. Part 280 promulgated by the United States Environmental Protection Agency (“EPA”) on July 15, 2015. See 80 Fed. Reg. 41566 (July 15, 2015). EPA has indicated that the changes to 40 C.F.R. Part 280 must be implemented at the state level (in authorized states) within three years after the effective date of the amendments to 40 C.F.R. Part 280 (which became effective on October 13, 2015).

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 prepared 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 of the new or added paperwork, reporting or notification requirements contained in Chapter 245 and objectively assess whether such requirements meaningfully contribute to achieving those environmental protection objectives.

Additional comments regarding key elements of the proposed changes to Chapter 245 are set forth below.

## **1. Reporting Requirements**

Chapter 245 contains multiple changes that implicate reporting obligations with respect to ASTs and USTs. Under the proposed changes to Chapter 245, the definition of a “reportable release” has been eliminated and supplemental language has been added to the definition of a “release.” In addition, 25 Pa. Code § 245.305 has been revised in connection with release reporting obligations. The upshot of these changes is to significantly expand the scope of release reporting requirements.

A key element of the requirements that 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 perspective 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, the EQB 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 the amounts of petroleum and regulated substances reaching secondary containment be counted for purposes of determining whether the foregoing quantity thresholds have been met. 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.

## **2. Exceptions to Definition of USTs – Wastewater Tank Systems**

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 will 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 consequences from the proposed change identified above is large. There does not appear to be any demonstration that wastewater tank systems have posed significant problems in a manner that would justify pulling such tank systems within the regulatory ambit of the storage tank program. We note that such tanks may be subject to other regulatory requirements even if not subject to the NPDES permitting program or the industrial wastewater pretreatment program. Moreover, the proposed changes are not consistent with the requirements under the federal UST program. While wastewater tank systems that are part of a wastewater treatment facility discharging pursuant to an NPDES permit or a pretreatment program are fully excluded from the federal UST program, other types of wastewater tank systems enjoy a partial exclusion that insulates such tanks from the vast majority of the requirements under the federal UST program. The proposed changes to Chapter 245, by contrast, leave wastewater tank systems not subject to the NPDES program or pretreatment requirements much more highly regulated than would occur under the federal UST program. We suggest that the proposed changes to Chapter 245 relating to wastewater tank systems be harmonized with federal requirements.

### **3. Standards of Performance for Certified Companies, Certified Installers and Certified Inspectors**

Proposed changes to 25 Pa. Code § 245.132 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.

### **4. Corrective Action Process**

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 regarding 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.

Under the proposed version of 25 Pa. Code § 245.303(e), PADEP is granted authority to waive or combine requirements relating to the corrective action process for storage tank systems based on the nature, extent, type, volume or complexity of the release, “including a release to a containment structure or a facility that is shown to be liquid-tight.” We are puzzled by the premise that the corrective action process would apply in circumstances where regulated substances have reached a liquid-tight secondary containment system and therefore presumably have not entered the environment. The corrective action process focuses on how to respond to regulated substances that make their way from a regulated storage tank system into the environment. Further clarification of the proposed language referenced above would be helpful in delineating how the foregoing provision is to be interpreted.

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.

## **5. Periodic Testing Requirements**

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

Kris Shiffer, Chief  
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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 that 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.

\* \* \* \* \*

We very much appreciate the opportunity provide comments regarding the proposed changes to Chapter 245.

Respectfully yours,



Michael M. Meloy  
For MANKO, GOLD, KATCHER & FOX, LLP

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cc: Environmental Quality Board ([RegComments@pa.gov](mailto:RegComments@pa.gov))  
Mr. Darryl D. Borrelli  
Michael C. Nines, P.E.  
Mr. William Hitchcock