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The Aboveground Storage Tank Act: Collaborating to Patch a Regulatory Leak

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On January 9, 2014, a chemical spill from an aboveground storage tank in Charleston, West Virginia contaminated the drinking water of approximately 300,000 residents and businesses in nine West Virginia counties. This "water crisis" was a cruel reminder that a chemical spill near a critical public water source can not only endanger the environment, but can also threaten public health. It also exposed a regulatory "soft spot" in the West Virginia Code and state regulations.

Although the West Virginia Legislature had established a comprehensive statutory framework in 1984 to prevent spills from *underground* storage tanks, it did not address *aboveground* tanks in that legislation. Consequently, aboveground tanks that were not otherwise regulated under an applicable federal or state permit escaped government oversight. This will no longer be the case, now that West Virginia Governor Earl Ray Tomblin's "Aboveground Storage Tank Act" has taken effect (as of June 6, 2014).



The Aboveground Storage Tank Act is the centerpiece of Senate Bill 373, the most important environmental and public health and safety bill passed during the 2014 Regular Session of the West Virginia Legislature. Governor Tomblin tasked his legal and policy advisors with drafting the Act just days into the water crisis, encouraging us to solicit ideas and feedback from experts both within and outside of state government.

The product of thoughtful collaboration, the Act contains valuable contributions from a diverse group of stakeholders. The collaborators include: the Department of Environmental Protection (DEP); the Department of Health and Human Resources (DHHR); its Bureau for Public Health (BPH); business associations and energy companies; legislative leadership; environmentalists; and the public.

The result is legislation reflecting the Governor's consensus-building leadership style. It contains reasonable, common-sense regulations that will protect the environment and public health. Importantly, the Act also accommodates business and industry interests, and does not duplicate existing federal or state regulations.

Among other things, the Act:

- Requires the Secretary of DEP to inventory and register aboveground storage tanks in West Virginia. With the inventory, state regulators will be able to easily access information on tank ownership, location, date of installation, capacity, age, type and volume of contents and distance from the nearest public water supply.
- Compels the Secretary of DEP to develop a regulatory program for new and existing tanks through legislative rulemaking. The regulatory program must incorporate nationally recognized performance standards



for designing, constructing and maintaining tanks to ensure structural integrity, spill prevention and secondary containment. The program must also include a procedure whereby DEP, working in conjunction with the Division of Homeland Security and BPH, can identify tanks within a “zone of critical concern” to determine whether additional permit requirements or inspections should be imposed.

- Mandates that tanks be inspected annually by registered professional engineers or similarly qualified experts to ensure they meet the minimum leak detection and secondary containment standards.
- Authorizes the Secretary of DEP to promulgate rules requiring owners and operators of tanks to demonstrate they have adequate financial resources to take corrective action in the event a spill occurs.
- Requires owners or operators to develop and submit to DEP site-specific spill prevention response plans for each tank. The plans must identify and describe site and tank hazards and include material safety data sheets for all stored fluids. Moreover, the plans must detail preventative maintenance programs and emergency contacts. Plans that do not meet DEP’s approval shall be rejected and revised.
- Compels owners or operators, where

required by the Secretary of DEP, to provide notice to public water systems, municipalities, and counties of the contents of their aboveground storage tanks. Owners or operators may also be required to provide these entities with copies of their spill prevention response plans.

- Safeguards the rights of tank owners and operators aggrieved by a DEP order, by affording them the right of appeal to the Environmental Quality Board.
- Prohibits duplicative enforcement proceedings arising from the same transaction or event.

The foregoing overview is by no means exhaustive. Individuals and entities interested in the Act should also review its penalty and fee provisions. Inventory and registration fees, for example, will be set through the legislative rulemaking process to ensure public participation and reasonableness.

Further, I encourage owners and operators of aboveground storage tanks (and their lawyers!) to pay close attention to the Act’s scope. Several types of aboveground tanks are specifically exempt from the Act’s permit requirements, because they do not pose a substantial threat of contamination or are sufficiently regulated elsewhere in the law. Examples include septic tanks, pipeline facilities, surface impoundments and water storage tanks.

The Aboveground Storage Tank Act is a fine example of how Governor Tomblin’s leadership and commitment to collaboration advanced a partnership between state government, industry leaders and the public to work together to patch a regulatory leak with reasonable regulations. I am confident the Act and the other important components of Senate Bill 373 would have prevented the water crisis and our recent winter of discontent. ▽