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PENNSYLVANIA'S STORAGE TANK ACT: STATUTE, REGULATIONS AND GUIDANCES

WM. STANLEY SNEATH†

I. INTRODUCTION

THE Storage Tank and Spill Prevention Act ("Tank Act")¹ charges the Pennsylvania Department of Environmental Resources ("DER") with developing and administering a regulatory program covering both underground and aboveground storage tanks.² DER's program is based on the underlying statute, regulations that are in place and under development, and on guidances that have been developed to flesh out and give substance to the program.³ The Pennsylvania storage tank program is concerned with activities that are the province of existing regulations established by other DER programs.⁴ Therefore, some familiarity with these regulations is useful. In addition, the United States Environmental Protection Agency ("EPA") developed an underground storage tank program.⁵ DER's program draws many elements from the federal program, but differs in significant ways.

† Assistant Counsel for the Office of Chief Counsel, Southeast Region, Commonwealth of Pennsylvania Department of Environmental Resources. The statements and positions set forth herein are the opinions of the author. They do not necessarily represent official positions of the Department, and may not be relied upon in litigation against or negotiations with the Department.

1. Storage Tank and Spill Prevention Act of 1989 ("Tank Act"), 35 PA. CONS. STAT. ANN. §§ 6021.101-2104 (Purdon 1993).

2. *Id.* § 6021.106. The Environmental Quality Board is the branch of DER responsible for promulgating regulations. *Id.* See also 71 PA. CONS. STAT. ANN. §§ 510-20. The regulations are subject to review by an advisory committee composed of a professional engineer and representatives from both the local government and the regulated community. 35 PA. CONS. STAT. ANN. § 6021.105.

3. See generally 25 PA. CODE § 245 (1994).

4. The Tank Act is modelled in part after the Solid Waste Management Act, 35 PA. CONS. STAT. ANN. §§ 6018.101-1003 (Purdon 1993), and the Clean Streams Law, 35 PA. CONS. STAT. ANN. §§ 691.1-1001 (Purdon 1993).

5. See generally 42 U.S.C. §§ 6991-91i (Supp. V 1993). The federal program anticipates a cooperative effort between federal and state agencies. See generally *id.* States are responsible for designating an appropriate agency to be notified of storage tank ownership. *Id.* § 6991a(b)(1). Furthermore, EPA is authorized to approve state "release, detection, prevention, and correction" programs to act in lieu of the federal program. *Id.* § 6991c(a). To be approved, the state program must be at least as stringent as the regulations promulgated by EPA. *Id.* § 6991c(b). Nothing in the federal statute, however, precludes a state from adopting regulations which are more stringent than federal requirements. 42 U.S.C. § 6991g.

As the storage tank program matures and evolves, there will be new regulations and, in certain cases, new interpretations of existing law. It is also expected that as old tanks are removed and new, more environmentally sound tanks are installed, the program's focus will shift from remediation to compliance with technical standards. Equally important is the advent of the long-mandated state fund for remediation and liability payments, which will speed the pace of remediations.⁶ Perhaps more significantly, from the perspective of consultants and remediation firms, the storage tank program will also create a pool of funds with which to pay for their services.⁷ DER expects a lot of activity in this area in the future.

II. THE TANK ACT

A. The Tank Act Generally

Pennsylvania's storage tank program is governed by the Tank Act, which regulates both aboveground storage tanks ("ASTs")⁸ and underground storage tanks ("USTs").⁹ It has a substantially wider scope than the Federal tank act found in the Resource Conservation and Recovery Act ("RCRA"),¹⁰ which deals only with underground storage tanks.¹¹ The Tank Act was amended in December, 1992.¹² As a result, DER's authority to issue regulations governing commercial heating oil tanks was limited,¹³ and the fee structure and deductibles for the Underground Storage Tank Indemnification Fund were altered.¹⁴ Although a number of attempts have

6. See generally 35 PA. CONS. STAT. ANN. §§ 6021.702-709 (Purdon 1993 & Supp. 1994).

7. *Id.* § 6021.702(a).

8. *Id.* §§ 6021.301-304.

9. *Id.* §§ 6021.501-506.

10. Resource Conservation and Recovery Act of 1976 ("RCRA") §§ 3001-5006, 42 U.S.C. §§ 6901-56k (1988 & Supp. IV 1992). RCRA was amended by the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984), to include federal regulation of underground storage tanks. *Id.* § 6991(a)-(i).

11. For a discussion of the relationship between federal and state regulatory schemes, see *supra* note 5 and accompanying text.

12. Act of December 18, 1992. Pub. L. No. 1660, No. 184 §§ 1-3 (1992) (current version at 35 PA. CONS. STAT. ANN. §§ 6021.101-2104).

13. Originally, § 6021.505 authorized the Environmental Quality Board to establish regulations concerning commercial heating oil storage tanks. 35 PA. CONS. STAT. ANN. § 6021.505. As revised, § 6021.505 directs the Board to adopt the regulations promulgated by EPA. 35 PA. CONS. STAT. ANN. § 6021.505 (Supp. 1994). If EPA fails to act by January 1, 1996, DER may adopt temporary regulations until federal requirements are adopted. *Id.*

14. 35 PA. CONS. STAT. ANN. § 6021.705 (Supp. 1994).

been made to further amend the Tank Act, these attempts have been unsuccessful. Yet the Act remains controversial because of the wide sweep of its coverage, and the possibility of substantial legislative change remains likely.

B. Definitions, Powers and Duties

Chapter One of the Tank Act defines terms,¹⁵ establishes an advisory committee,¹⁶ authorizes the promulgation of implementing regulations,¹⁷ describes the general powers and duties of DER,¹⁸ and provides for the interim certification of tank installers and tank inspectors.¹⁹ DER is authorized to enter into cooperative agreements to delegate certain portions of its regulatory authority to other governmental entities.²⁰ To date, no such delegations have taken place. Chapter One also provides authority for DER to require the production of records, to conduct inspections, and to obtain search warrants.²¹ Specific enforcement provisions include

15. *Id.* § 6021.103.

16. *Id.* § 6021.105.

17. *Id.* § 6021.106.

18. 35 PA. CONS. STAT. ANN. § 6021.107. This section contains a recital of Department authorities and powers which supplements those found in Chapter 13, the general enforcement section of the Tank Act. *Id.*

19. *Id.* § 6021.108.

20. *Id.* § 6021.107(a). This section permits delegation to "other State agencies, Federal agencies, and cities and counties of the first and second class . . . provided that the counties and cities of the first and second class have a storage tank program in effect that is at least as stringent as this act." 35 PA. CONS. STAT. ANN. § 6021.107(a).

21. *Id.* § 6021.107(c). The authority of DER agents to inspect is not subject to a notification requirement. *Id.* § 6021.107(c)(2). Upon presentation of appropriate identification, DER agents may enter and inspect the premises of any regulated facility. *Id.* § 6021.105(c)(1). If an owner or operator refuses to allow admittance, the agents may obtain a search warrant on a showing of probable cause. 35 PA. CONS. STAT. ANN. § 6021.107(c)(3). This standard of probable cause may be met on a showing of any one of the following:

(i) The inspection, examination, test or sampling is pursuant to a general administrative plan to determine compliance with this act.

(ii) The agent or employee has reason to believe that a violation of this act has occurred or is likely to occur.

(iii) The agent or employee has been refused access to the property, building, premises, place, book, record, or other physical evidence on sites or pertaining to matters governed by this act or has been prevented from conducting tests or obtaining physical evidence which activities are necessary to determine compliance or to respond to a violation of this act.

(iv) The object of the investigation is subject to regulation under this act and access, examination, inspection or testing is necessary to enforce the provisions of this act.

Id.

the authority to establish a certification and licensing program,²² to revoke any permit,²³ to conduct enforcement activities,²⁴ to order the performance of corrective action or to perform corrective action,²⁵ and to recover costs.²⁶

Some of the most difficult issues associated with the Tank Act arise in the definitions section.²⁷ Foremost among these issues is what qualifies as a "regulated tank". Although the Tank Act nominally regulates aboveground tanks of larger than 250 gallons and underground tanks of larger than 110 gallons, there are a number of exclusions and partial exclusions for various types of tanks.²⁸ These exclusions include certain on-site commercial heating oil tanks (all ASTs and USTs less than or equal to 3000 gallons), certain small farm and residential fuel tanks (less than or equal to 1100 gallons), "flow-through process tanks," propane tanks, and certain tanks which are regulated under other federal and state acts.²⁹

The scope of the Tank Act differs in several respects from that of the Federal tank law. Two significant distinctions are found in the Tank Act's coverage of ASTs and commercial heating oil USTs of greater than 3000 gallons capacity, neither of which are regulated under the federal statute.³⁰ There are also less obvious variations that make the use of RCRA language, and EPA's regulatory interpretations of what is a covered UST, a less than fully reliable guide to the Pennsylvania statute. For instance, the Tank Act excludes tanks permitted under the Solid Waste Management Act.³¹

22. 35 PA. CONS. STAT. ANN. § 6021.107(d).

23. *Id.* § 6021.107(e).

24. 35 PA. CONS. STAT. ANN. § 6021.107(f).

25. *Id.* § 6021.107(g).

26. *Id.* § 6021.107(h).

27. *Id.* § 6021.103.

28. *See generally* 35 PA. CONS. STAT. ANN. § 6021.103.

29. *See generally id.*

30. *See* 42 U.S.C. § 6991. There have been a number of legislative initiatives which have taken aim at the Department's authority to regulate commercial heating oil tanks. At present, the only change to the original scheme is the deferral of regulatory authority over this class of tanks found in the December, 1992 amendments. 35 PA. CONS. STAT. ANN. § 6021.505; *see also supra* notes 12-13 and accompanying text. To date, the other proposals have fallen short of passage. However, there has been strong support in both houses of the Pennsylvania legislature for dropping the coverage of commercial heating oil tanks, and it is still possible that this change may be enacted in the future. Proposed legislation to this effect includes Senate Bill 618, 177th General Assembly (1993), and House Bill 2564, 178th General Assembly (1994).

31. Solid Waste Management Act, 35 PA. CONS. STAT. ANN. §§ 6018.101-1003 (Purdon 1993). The residual waste regulations authorize certain facilities to oper-

Another potential source of confusion is the exclusion of ASTs, which fit the description of “[a] flow-through process tank, including, but not limited to, a pressure vessel or process vessel and oil and water separators.”³² This language differs from the definitions of USTs found in the federal act, which exclude only “flow-through process tanks.”³³ This variation would appear to exclude pressure vessels and oil-water separators, which are not “flow-through process tanks.”³⁴

The definition of “owner” is particularly important because it contains a provision that may impose liability on owners who abandoned contaminated USTs prior to the effective date of the federal act.³⁵ In addition, it may also impose liability on UST owners who sold their tanks after the effective date of the act.³⁶ Owners of ASTs who abandoned tanks prior to the effective date of the Tank Act face similar exposure, as do AST owners in the chain of title since that date.³⁷

ate under a permit by rule. 25 PA. CODE § 287.102 (1993). Tanks in “permit by rule” facilities are covered by this exemption.

32. 35 PA. CONS. STAT. ANN. § 6021.103.

33. 42 U.S.C. § 6991(1)(G).

34. See 53 Fed. Reg. 37,082, 37,119-21 (1988) (codified at 40 C.F.R. pt. 280). Whether the “flow-through process tank” exception extends to recurring or intermittent flow tanks has been a source of varying interpretation by EPA. Commentators are unable to agree on whether oil-water separators are flow-through process tanks. *Id.*

35. 35 PA. CONS. STAT. ANN. § 6021.103. Specifically, the definition provides:

(1) In the case of a storage tank in use on the effective date of this act, or brought into use after that date, any person who owns or has an ownership interest in a storage tank used for the storage, containment, use or dispensing of regulated substances.

(2) In the case of an aboveground storage tank in use before the effective date of this act, but no longer in use on the effective date of this act, any person who owned the aboveground tank, immediately before the discontinuance of its use, as well as any person who meets the definition of owner in paragraph (1).

(3) In the case of an underground storage tank, the owner of an underground storage tank holding regulated substances on or after November 8, 1984, and the owner of an underground storage tank at the time all regulated substances were removed when removal occurred prior to November 8, 1984.

Id. This language was taken almost verbatim from the federal statute. See 42 U.S.C. § 6991(3).

36. 35 PA. CONS. STAT. ANN. § 6021.103.

37. *Id.* With respect to AST owners, liability attaches to “any person who owned an aboveground tank, immediately before discontinuance of its use.” *Id.* Liability is not qualified by the timing of a removal action. *Id.*

C. Aboveground and Underground Tanks

Chapter Three³⁸ addresses ASTs and establishes interim provisions,³⁹ registration⁴⁰ and permitting⁴¹ requirements.⁴² The interim standards set forth in Chapter Three include a number of American Petroleum Institute ("API") and Underwriters Laboratory ("UL") specifications.⁴³ DER has just begun to develop specific technical standards for ASTs, but these interim standards will apply for some time to come. AST owners should also be aware of the State Police Fire Marshal regulations,⁴⁴ which are still applicable to ASTs,⁴⁵ at least where not specifically superseded by the standards adapted by the Tank Act. These regulations govern isolation distances, structural requirements, and other technical requirements.⁴⁶ Owners are also required to comply with specified preventive measures to avoid overfilling.⁴⁷ Yet no remedial plan is provided in the event of a spill.⁴⁸

38. All of the Chapters of the Tank Act are odd-numbered.

39. 35 PA. CONS. STAT. ANN. § 6021.302.

40. *Id.* § 6021.303. ASTs must be registered annually. *Id.* Registration fees are based on the size of the tank. *Id.* § 6021.302(a). It is illegal to place a regulated substance into an unregulated tank, and distributors who do so may be liable for corrective action should that tank cause a release. 35 PA. CONS. STAT. ANN. § 6021.303(b).

41. *Id.* § 6021.304. The Tank Act requires a person to obtain a permit for any "installation, construction, modification, operation or removal from service" of any AST. *Id.* § 6021.304(a). Permit requirements are to be promulgated by DER; in the interim, permits shall be issued for any application meeting the requirements set forth in § 6021.302(b). *Id.* § 6021.304(f).

42. 35 PA. CONS. STAT. ANN. § 6021.301.

43. *See* 35 PA. CONS. STAT. ANN. § 6021.302(b). UL 142 applies to shop fabricated ASTs up to 50,000 gallons capacity. However, transportation limitations (larger tanks are too big for highway transport) generally limit UL 142 tanks to an upper size of approximately 30,000 gallons. API-650 applies to field erected ASTs. The other API standards apply to more specialized tanks and to tank modifications.

44. 37 PA. CODE §§ 13.1-226 (1994).

45. The 1992 amendments to the Tank Act specifically direct the State Fire Marshal to "establish fire protection requirements by regulation for aboveground storage and dispensing tanks." 35 PA. CONS. STAT. ANN. § 6021.305 (Supp. 1994). To date, the Fire Marshal has instituted such regulations; existing regulations, however, retain some applicability. *See* 37 PA. CODE §§ 13.1-226.

46. *See generally* 37 PA. CODE §§ 13.1-226.

47. *Id.* § 13.12. This provision applies specifically to tanks which receive flammable and combustible liquids from pipelines and marine vessels. *Id.*

48. The Fire Marshal regulations do, however, provide for the removal of USTs in the event of a leak. 37 PA. CODE § 13.27. Due to definitional inconsistencies between the Tank Act and the Fire Marshal regulations, some ASTs may fall within this remedial measure. *See* 23 Pa. Bull. §§ 5137-39 (1993) (to be codified at 37 PA. CODE ch. 14).

Chapter Five contains the provisions specific to USTs.⁴⁹ Guidelines for a regulatory program,⁵⁰ interim provisions,⁵¹ registration,⁵² and permitting requirements⁵³ are all outlined. The interim standards in Chapter Five, however, have been largely superseded by regulatory standards and no longer apply.⁵⁴ The Tank Act was amended in December 1992 to limit DER's authority to create regulations governing otherwise regulated commercial heating oil tanks (USTs larger than 3000 gallons).⁵⁵ DER did not find that this amendment effectively repealed the interim standards as applied to commercial heating oil tanks.⁵⁶ As a matter of policy, however, DER is not strictly enforcing the interim standards for commercial heating oil tanks.⁵⁷ DER has indicated that it will continue to encourage the use of proper procedures for the closure for all regulated USTs, and has strongly suggested that new UST installations comply with federal requirements.

D. Financial Provisions

Chapter Seven includes provisions for financial responsibility and sets up several funds.⁵⁸ The first is the Storage Tank Fund, to which all fines, penalties, and registration fees must be paid.⁵⁹ All income derived from the Storage Tank Fund is reapportioned to DER to offset the costs incurred in operating the storage tank program.⁶⁰ Though the Storage Tank Fund may be supplemented by

49. 35 PA. CONS. STAT. ANN. § 6021.501-06.

50. *Id.* § 6021.501.

51. *Id.* § 6021.502.

52. *Id.* § 6021.503.

53. 35 PA. CONS. STAT. ANN. § 6021.504.

54. DER Fact Sheet No. 14, Interim Permits for Aboveground and Underground Storage Tanks [hereinafter DER Fact Sheet] (March 1994) (on file with author and available at DER offices).

55. Pub. L. No. 1660, No. 184 § 3 (1992). For a comparison of the former and revised versions of § 6021.505, see *supra* notes 12-13 and accompanying text.

56. See generally DER Fact Sheet, *supra* note 54.

57. See *id.* at 3. DER exempts from § 6021.502(b) and 40 C.F.R. pt. 240, heating oil tanks greater than 3000 gallons capacity used for space heating on the premises based on the 1992 amendments to § 6021.505. *Id.* See also DER Division of Storage Tanks Program Guidance 8.2.2, Commercial Heating Oil Tanks (April 1994) (on file with author).

58. 35 PA. CONS. STAT. ANN. § 6021.701. A tank owner meets the requirement of "financial responsibility" by maintaining satisfactory liability coverage. *Id.* § 6021.701(b). This requirement is not met by retaining private coverage. *Id.* Rather, coverage must be retained through the Funds established in this chapter. *Id.* See also 25 PA. CODE §§ 267, 971.

59. 35 PA. CONS. STAT. ANN. § 6021.702.

60. *Id.* § 6021.702(a).

appropriations from federal, state, or local sources,⁶¹ no general fund monies have been used. Grants from EPA, however, have been accepted.

The second fund is the Underground Storage Tank Indemnification Fund ("USTIF").⁶² This fund, administered by a special board called the Underground Storage Tank Indemnification Board ("Board"),⁶³ will protect tank owners against liabilities arising out of releases from underground storage tanks.⁶⁴ Coverage amounts are set at \$1,000,000 over separate deductibles of \$10,000 for both corrective action and for third party liability claims.⁶⁵ In order to be eligible, UST owners must pay the fees assessed by the Board and keep their tanks registered.⁶⁶ Owners must also have DER permits, if required.⁶⁷ USTIF participation satisfies most of the financial responsibility obligations imposed on UST owners; coverage of the deductible, however, remains the responsibility of owners.⁶⁸

The third fund is the Storage Tank Loan Fund.⁶⁹ This fund, administered by the Pennsylvania Department of Commerce, provides loans to offset liability in situations where DER can identify no

61. *Id.* § 6021.704.

62. *Id.*

63. 35 PA. CONS. STAT. ANN. § 6021.703. The Board is composed of seven members. The Insurance Commissioner and the Secretary of DER serve as *ex officio* members. The Governor must appoint the other five members from specified groups. One member each is appointed from the nominee lists submitted by: (1) the Associated Petroleum Industries of Pennsylvania; (2) the Pennsylvania Petroleum Association; and (3) the Service Station Dealers and Automotive Repair Association, Inc. The remaining two members consist of a local government official having "knowledge and expertise in underground storage tanks," and a member of the public who is not an owner or operator of a storage tank. *Id.* § 6021.703.

64. *Id.* § 6021.704. Payments from the fund are limited to the actual cost of remedial action up to \$1,000,000.00. *Id.* § 6021.704(b). Originally, § 6021.705(c) established deductible levels at \$75,000 for corrective action claims and \$150,000 for personal injury claims. *Id.* § 6021.705(c)(1)-(2) (1993). Under the 1992 amendments, however, the deductible for corrective action claims was reduced to \$10,000. Deductibles for personal injury claims are set by the Board in amounts which are not to fall below \$5,000. *Id.* § 6021.705.

65. *Id.* § 6021.705(c)(1). This provision authorizes the Board to adopt additional eligibility requirements by regulation. *Id.* § 6021.706.

66. *See id.* § 6021.706(2)-(3). The USTIF is also subject to periodic review under the Sunset Act. 35 PA. CONS. STAT. ANN. § 6021.708. *See* 71 PA. CONS. STAT. ANN. § 1795. Under the Sunset Act, a standing committee of the Senate or House of Representatives is assigned to review and evaluate state agencies. Upon completion of this function, the standing committee shall determine whether to terminate, alter, or continue a particular agency. *Id.* § 1795.5.

67. 35 PA. CONS. STAT. ANN. § 6021.706(4).

68. *Id.* § 6021.705(c)(1).

69. *Id.* § 6021.709.

more than two potentially liable tank owners.⁷⁰ Availability of the loans is further restricted to tank owners who individually own no more than twenty tanks.⁷¹ Upon written request, eligible owners may receive long-term, low-interest loans in an amount up to \$50,000 at an interest rate not to exceed two percent.⁷²

E. Siting and Other Special Requirements for ASTs

Chapter Nine requires owners of AST facilities with over 21,000 gallons of total capacity to prepare and submit spill prevention response plans ("SPR Plans"), which are reviewed by DER.⁷³ In the event of a release, an owner must notify all downstream water users within twenty miles, the Pennsylvania Emergency Management Agency, the county emergency management agencies, and downstream municipalities.⁷⁴ SPR Plans should identify downstream users and list the contact phone numbers for all those users and agencies which are to be notified.⁷⁵ Chapter Nine also designates DER as the agency in charge of any emergency response efforts resulting from a storage tank release.⁷⁶ This grant of authority is qualified to the extent that it conflicts with federal law.⁷⁷ Furthermore, Chapter Eleven requires county and municipal government notification prior to the construction of any AST of over 21,000 gallons.⁷⁸ The Environmental Quality Board is also required to prepare siting regulations for such tanks.⁷⁹ Because no such

70. *Id.* § 6021.709(a)-(b).

71. 35 PA. CONS. STAT. ANN. § 6021.709(b).

72. *Id.*

73. *Id.* § 6021.901. All existing plans adopted pursuant to the Clean Streams Law, "must be revised within one year of the effective date of this act." *Id.* § 6901.901(c).

74. *Id.* § 6021.904. This section further provides that in the event that the owner or operator fails to make the required notifications or is unable to do so, "the county emergency management agency shall make the required notifications." *Id.* § 6021.904(a).

75. 35 PA. CONS. STAT. ANN. § 6021.904(b). The contact list must be updated annually. *Id.*

76. *Id.* § 6021.904(c).

77. 42 U.S.C. § 6991g. Presumably, in most situations, EPA would defer authority to the state agency. Under the federal storage tank program, EPA may approve state programs and grant primary enforcement authority to the state agency. *Id.* § 6991c.

78. 35 PA. CONS. STAT. ANN. § 6021.1101. In considering an application to construct an AST, DER may conduct a public hearing and is required to publish notification of such application in the Pennsylvania Bulletin and provide a sixty day comment period. *Id.* § 6021.1101(b). Any other permit application for an AST facility must be published in the Pennsylvania Bulletin and provide for a thirty day comment period. *Id.* § 6021.1101(c).

79. *Id.* § 6021.1102.

regulations have been drafted to date, the Fire Marshal's regulations still apply.⁸⁰

F. Enforcement Authority

The Storage Tank Act's enforcement provisions are found in Chapter Thirteen.⁸¹ These are patterned after the Clean Streams Law.⁸² The Clean Streams Law covers any surface or ground water pollution,⁸³ and contains permitting and cleanup provisions⁸⁴ similar to those incorporated into the Tank Act.⁸⁵ To the extent that there are differences from and enhancements to the Clean Streams Law enforcement provisions, these are largely drawn from the Solid Waste Management Act.⁸⁶ Upon release or threat of release from a storage tank, owners, operators, landowners, or land occupiers become liable for corrective action and/or damages.⁸⁷ DER may issue corrective action orders or perform corrective action and seek reimbursement.⁸⁸ There is a specific provision requiring tank owners or operators to replace any water supplies affected by a release.⁸⁹ This obligation has been further defined by the Corrective Action Process regulations.⁹⁰

80. 37 PA. CODE § 13.1 (providing various tables regulating the location of ASTs in relation to "property lines, public ways and other property."). *Id.*

81. 35 PA. CONS. STAT. ANN. §§ 6021.1301-1315.

82. Pennsylvania Clean Streams Law, 35 PA. CONS. STAT. ANN. §§ 691.1-1001 (Purdon 1993).

83. *Id.* § 691.1.

84. *Id.* §§ 691.609, 316; *cf.* 35 PA. CONS. STAT. ANN. §§ 6021.1301, 1302.

85. *See, e.g., Gabig's Auto Serv. v. DER*, 1991 WL 274581 (Pa. Env'tl. Hearing Bd. November 27, 1991) (affirming DER order compelling gasoline station owner to hire hydrogeologist to investigate possible groundwater contamination pursuant to Clean Streams Law).

86. *See generally* 35 PA. CONS. STAT. ANN. §§ 6018.101-1003.

87. *Id.* § 6021.1302.

88. *Id.* This section is the most likely to be cited by DER in any enforcement action under the Tank Act. *See J.C. Hayes v. Commonwealth*, 1991 WL 137050 (Pa. Env'tl. Hearing Bd. June 11, 1991). As previously noted, § 6021.1302 most closely parallels § 691.316 of the Clean Streams Law. *See supra* note 84 and accompanying text. Prior to the passage of the Tank Act, DER relied upon the Clean Streams Law to require cleanups from leaking storage tanks. *See A.H. Grove & Sons, Inc. v. Commonwealth*, 452 A.2d 586 (Pa. Commw. Ct. 1982); *Gabig's Auto Serv.*, 1991 WL 274581.

Because remedial action under the Clean Streams Law is limited to situations involving actual or threatened contamination, the Tank Act's applicability is potentially wider in scope. *See, e.g., Hrivnak Motor Co. v. Commonwealth*, 1993 EHB 432 (April 6, 1993) (amending order compelling gasoline station owner to conduct precision testing of underground storage tanks because Tank Act mandated unused storage tanks must be sealed or removed regardless of actual contamination).

89. 35 PA. CONS. STAT. ANN. § 6021.1303(b).

90. 25 PA. CODE § 245.307 (1994). This section provides:

DER may assess civil penalties of up to \$10,000 for each violation of the Tank Act.⁹¹ The person receiving the assessment has thirty days to post an appeal bond in the amount of the assessment and to file an appeal with the Environmental Hearing Board.⁹² DER may also assess costs associated with agency initiated and funded corrective action.⁹³ Furthermore, the agency may file a lien against the property of a person who has failed to pay civil penalties or assessments, if such person has failed to appeal the assessment.⁹⁴ DER is also authorized to impose a lien against the property of a liable individual to recover corrective action expenses.⁹⁵ Liens may be imposed once the agency has incurred expenses, without first requiring a formal assessment or allowing the opportunity for an appeal.⁹⁶

Additionally, any violation of the Tank Act may be abated through a public or private nuisance action.⁹⁷ An individual who wishes to bring a private action must provide sixty days notice to DER and to any potentially liable party.⁹⁸ If DER has already commenced litigation before a court or the Environmental Hearing Board to abate such nuisance, the private action is barred, and a

(c) A temporary water supply shall be provided as soon as practicable but not later than 48 hours after one of the following:

(1) The responsible party receives information which establishes that the responsible party has affected or diminished the water supply.

(2) The responsible party is notified by the Department that the responsible party has affected or diminished the water supply.

Id. § 245.307(c). The code further provides that a permanent water supply must be provided within ninety days after an occurrence of either of the above listed criteria. *Id.* § 245.307(d).

91. 35 PA. CONS. STAT. ANN. § 6021.1307(a). In assessing the amount of a penalty, "the Department shall consider the willfulness of the violation; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violations; and other relevant factors." *Id.*

92. *Id.* § 6021.1307(b). Alternatively, a person may also forward the amount of the assessment to the Department to be placed in an escrow account with the State Treasurer or any Pennsylvania bank. *Id.*

93. *Id.* § 6021.1302(b). Specifically, this section provides:

For purposes of collecting or recovering the expense involved in taking corrective and cost recovery action, litigation, oversight, monitoring, sampling, testing and investigation related to a corrective action, the department may collect the amount in the same manner as civil penalties are collected under the provisions of section 1307(b).

Id.

94. *Id.* § 6021.1307(b).

95. 35 PA. CONS. STAT. ANN. § 6021.1307(b). Such liens are imposed to reimburse payments made through the Storage Tank Fund.

96. *Id.* § 6021.1307(b).

97. *Id.* § 6021.1305(c).

98. *Id.* § 6021.1305(d).

right of intervention is created.⁹⁹ A presumption of liability applies to tank owners and operators where regulated substances are found to be contaminating the environment within 2500 feet of a storage tank site.¹⁰⁰ This presumption applies to both current and past owners.¹⁰¹ The presumption can be overcome by clear and convincing proof that the source was elsewhere.¹⁰² This presumption applies in both DER enforcement actions¹⁰³ and, at least for now in private civil actions.¹⁰⁴ Given the difficulties of tracing and tracking groundwater and other subsurface contamination, the presumption will substantially ease the burden for both DER and for civil plaintiffs.

Chapter Thirteen also contains permit block language similar to that of the Clean Streams Law.¹⁰⁵ DER is authorized to deny or revoke permits based on a pattern of non-compliance with the Act, but an informal hearing prior to denial of a permit is necessary.¹⁰⁶ A twenty year statute of limitations is provided for all civil and crimi-

99. 35 PA. CONS. STAT. ANN. § 6021.1305(c).

100. *Id.* § 6021.1311(b). This section enumerates four separate defenses, all of which must be demonstrated by clear and convincing evidence. *Id.* The first defense allows an owner to escape liability if site surveys of all areas within 2500 feet of the storage tank *facility* demonstrate that contamination existed prior to the use of any storage tank. *Id.* The second defense allows an owner to avoid liability if an adjacent landowner within 2500 feet of the storage tank *facility* refuses to allow access to conduct a site survey in accordance with the first defense. *Id.* The third defense allows an owner to escape liability if no contamination exists within 2500 feet of the perimeter of the *storage tank*. 35 PA. CONS. STAT. ANN. § 6021.1311(b). The fourth defense allows an owner to escape liability if it can be affirmatively shown that the owner did not contribute to the contamination. *Id.* (emphasis added).

The distinction between a storage tank "facility" in defense one, and a "storage tank" in defense three, relates to the substantive elements of the respective defenses. In the first defense, the owner concedes actual contamination but seeks to avoid liability by showing through site surveys that the contamination existed before utilization of a storage tank. The third defense, however, relates entirely to actual contamination and allows an owner to avoid liability only if it can demonstrate that the tank is not the source of any contamination.

101. See *J.C. Hayes*, 1991 WL 137050 (Pa. Envtl. Hearing Bd. June 11, 1991) (stating prior owner of leaking UST qualifies as "owner" under Tank Act and is presumed liable for contamination within 2500 feet of UST).

102. 35 PA. CONS. STAT. ANN. § 6021.1311(a).

103. See *Ron's Auto Serv. v. Commonwealth*, 1992 WL 160334 (Pa. Envtl. Hearing Bd. 1992); *Lehigh Gas & Oil Co. v. Commonwealth*, EHB Docket No. 91-552-MR June 1, 1994) (unpublished opinion on file with Environmental Hearing Board).

104. See *Centolanza v. Lehigh Valley Dairies, Inc.*, 635 A.2d 143, 149 (Pa. Super. Ct. 1993) (stating "because action by a private person is no different than one brought by the Commonwealth under the act, the presumption is equally available in a private action.").

105. 35 PA. CONS. STAT. ANN. § 6021.1301.

106. *Id.* Specifically, this section provides:

nal actions, which runs from the date of the discovery of the contamination, not the date of release.¹⁰⁷

III. OVERVIEW OF DER'S REGULATORY PROGRAM

A. Registration

1. General Requirements

All tank owners are required to register their tanks and pay an annual registration fee of \$50 for each underground tank and between \$50 and \$300 for each above-ground tank.¹⁰⁸ DER has developed a Storage Tank Data System ("STDS"), which prepares invoices, records payments, and generates stickers and certificates for registered tanks.¹⁰⁹ DER's Central Office handles tank registrations, except for abandoned tanks being registered for removal. The usual procedure is to submit a registration form to the Central Office, without a check for the registration fees.¹¹⁰ Due to the limitations of STDS, fees cannot be accepted before an invoice is generated.¹¹¹ Where new tanks are being installed, the registration form may be submitted in advance to allow time for generating an invoice, processing payment and mailing of registration stickers. When it is necessary for the registering party to obtain products immediately, the regional office may issue a temporary letter, authorizing the filling and operation of the tank.¹¹²

If renewal registration fees are not paid, owners will not receive stickers, and may not receive invoices in future years.¹¹³ However,

The department shall not issue any permit. . . or amend any permit. . . and may revoke any permit. . . if it finds, after investigation and an opportunity for informal hearing, that:

(1) the applicant has failed and continues to fail to comply with any provisions of Federal or State law which are in any way connected with or related to the regulation of storage tanks or of any relevant rule, regulation, permit or order of the department or related to the regulation of storage tanks.

(2) the applicant has shown a lack of ability or intention to comply with any law, rule, regulation, permit or order of the department issued pursuant to this act as indicated by past or continuing violations.

Id.

107. *Id.* § 6021.1314.

108. DER Division of Storage Tanks Program Guidance No. 2.1.3, Change of Tank Ownership Registration Procedures [hereinafter Program Guidance] (March 11, 1994) (on file with author).

109. *Id.* at 1.

110. *See generally id.* The Program Guidance discusses changes of tank ownership registration in several different contexts with slightly different procedures.

111. *See generally id.*

112. Program Guidance, *supra* note 108, at attachments B-C.

113. *See id.* at attachments B-G.

the owners will still be liable for back registration fees until the tank is properly closed, and may be subject to enforcement action for failure to register their tanks. Where abandoned tanks are discovered, DER will only require the payment of one year's fees if the tanks are promptly removed. The appropriate regional offices handle registrations.

Tank ownership may be unclear if the chain of title is cloudy, or if a prior property owner abandoned a tank and the current property owner is not aware of its existence. The present registration form contains a certification that the person signing the form is the owner. Where there is a dispute over ownership, the form should be submitted with a notation that there is an ownership dispute. DER will not attempt to solve ownership disputes but will accept payment of a registration fee from anyone with a prima facie claim to ownership. In so doing, the agency does not make a determination that the registrant is the actual owner. Purchasers of registered tanks must pay a pro-rated registration fee for the remainder of the current registration year.¹¹⁴ New stickers and registration certificates will then be issued to the new owner.

2. Distributor Liability

On August 5, 1990, it became illegal to sell, distribute, deposit, or fill an underground or aboveground tank with regulated substances, unless that tank was registered with DER.¹¹⁵ A distributor who violates this prohibition becomes liable, in conjunction with the tank owner, for any releases from the tanks involved.¹¹⁶ The primary purpose of distributor liability is to encourage compliance with the tank registration requirements by giving the distributor a direct interest in seeing tanks registered. Although there have been a number of complaints about the alleged unfairness of this liability, it was a statutory mandate, and is not subject to modification by DER.

There have been several Environmental Hearing Board decisions chiding DER for imposing large monetary penalties against distributors for violating this prohibition, at least where the corresponding penalties against tank owners for failure to register were substantially less.¹¹⁷ DER responded to this criticism by developing

114. See Program Guidance, *supra* note 108.

115. 35 PA. CONS. STAT. ANN. §§ 6021.303(b), 503(b).

116. *Id.*

117. See *Carlos R. Leffler, Inc. v. Commonwealth*, EHB Docket No. 91-210-W (June 23, 1993) (unpublished opinion on file with Environmental Hearing Board). In response to a DER argument that high penalties were necessary to

a penalty matrix which is drawn directly from the Tank Act language. The use of this matrix may lower the distributor penalties somewhat, but will also increase the penalties for registration violations.

B. Corrective Action Process Regulations

On August 21, 1993, the Corrective Action Process Regulations ("CAP Regulations") became effective.¹¹⁸ These regulations set forth the reporting and response requirements in the event that a release from a storage tank is suspected or confirmed.¹¹⁹ The CAP Regulations are designed to guide a tank owner through the process, from initial investigation of a suspected release through the completion of remedial action.¹²⁰ Time frames and lists of appropriate tasks are provided for each step.¹²¹

Where a release is suspected, the owner or operator has seven days to conduct an investigation to ascertain the existence of a possible spill.¹²² Where the release is confirmed, either after an investigation, or where the release is readily apparent, the owner or operator must report it to the appropriate regional office within two hours.¹²³ In addition, if any downstream user notifications are required under the provisions of Chapter Nine of the Tank Act, these calls must also be made promptly.¹²⁴ Certain small releases need not be reported, provided that they are controlled and are entirely removed within twenty-four hours.¹²⁵ If otherwise unre-

effectively deter distributors from depositing wastes in unregistered tanks, the Environmental Hearing Board stated:

The Department's policy toward deterrence is somewhat confusing. On the one hand, the Department does not believe it is necessary to impose high civil penalties in order to deter tank owners from violating § 503(a), while on the other hand, the Department does impose severe penalties on distributors to deter them from violating § 503(b).

Id. at 879.

118. 25 PA. CODE §§ 245.301-313. The regulations, which apply to both ASTs and USTs, are loosely patterned after the requirements of the federal corrective action legislation. See 40 C.F.R. § 380 (1994). The CAP Regulations supersede the federal requirements.

119. See 25 PA. CODE § 245.301.

120. *Id.* §§ 245.301-313.

121. *Id.*

122. *Id.* § 245.304.

123. 25 PA. CODE § 245.305(a). If the release is non-reportable, the owner does not have to notify DER, but does have to take proper corrective actions to recover or remove the contamination. *Id.* § 245.305(b).

124. *Id.* § 245.305(e).

125. 25 PA. CODE § 245.1. This section defines a reportable release as: A quantity or an unknown quantity of regulated substance released to or posing an immediate threat to surface water, groundwater, bedrock, soil

portable spills are not cleaned up within that time frame, they must also be reported.¹²⁶

The owner's reporting requirement is supplemented by the obligation of certified installers and inspectors to report suspected or observed contamination.¹²⁷ If suspected contamination is encountered during tank handling activity (commonly during a tank removal) the installer must file a written notice of contamination with DER. While the regulation does not specify a time frame for submitting this report, DER expects these to be mailed within forty-eight hours. If the contamination is confirmed, the owner is obligated to make the reports required by the CAP regulations.¹²⁸

Once a release is confirmed and reported, the owner shall take immediate "interim remedial action," without DER pre-approval.¹²⁹ Interim remedial actions include removal of any remaining substance from the tank,¹³⁰ explosion and vapor hazard abatement,¹³¹ soil excavation,¹³² and free product recovery.¹³³ While there is no express time limit placed on the performance of interim remedial actions, the regulations do require that a site characterization report be submitted to DER within 180 days of first reporting the release.¹³⁴ The scope and complexity of the site characterization report will be commensurate with the nature of the release.¹³⁵ In many cases, this report need only consist of a brief recitation of

or sediment. The term does not include the following, if the owner or operator has control over the release, the release is completely contained and, within 24 hours of the release, the total volume of the release is recovered or removed in the corrective action:

- (i) A release to the interstitial space of a double-walled aboveground or underground storage tank.
- (ii) A release of less than 25 gallons to a containment area, structure or facility around an aboveground storage tank.
- (iii) A release of less than 5 gallons to a synthetic surface, such as asphalt or concrete, which prevents migration of the regulated substance to surface water, groundwater, bedrock, soil or sediment.
- (iv) A release of less than 1 gallon to surface soils.

Id.

126. *Id.* The spill reporting threshold is 1 gallon on the ground, 5 gallons onto a synthetic surface such as asphalt, 25 gallons into a containment dike surrounding an AST, and any release confined to the interstitial space of a double-walled tank. *Id.*

127. 25 PA. CODE § 245.132(a)(4).

128. *Id.* § 245.306.

129. *Id.* § 245.306(a).

130. *Id.* § 245.306(a)(1).

131. 25 PA. CODE § 245.306(a)(2).

132. *Id.* § 245.306(a)(3)(i).

133. *Id.*

134. *Id.* § 245.310(a).

135. 25 PA. CODE § 245.310(a).

necessary background information and a description of the interim remedial steps taken to control and remove the spilled material.¹³⁶ However, in cases where excavation of contaminated soil is performed, the site characterization report should also delineate the actual volume of soil excavated and the amount of remaining contaminated soil.¹³⁷ Where limited contamination is encountered during a tank closure, corrective action may be avoided.¹³⁸

In some cases, interim remedial measures will not alleviate the full extent of contamination. In cases where the site characterization report indicates the continued presence of contamination stemming from a release, the owner or operator must submit a remedial action plan within forty-five days of the submission of the site characterization report.¹³⁹ Upon receipt of the owner or operator's remedial action plan, DER can respond in a number of ways. A response may range from a simple notice to proceed with the cleanup, to a request for a new site characterization and new proposal.¹⁴⁰

Once DER approves a remedial action plan, the owner or operator must implement the plan,¹⁴¹ and upon completion, submit a remedial action completion report.¹⁴² DER then has the option to accept the report or to require more work.¹⁴³ Due to the large number of storage tank releases which have been reported to DER, the agency has chosen to take some regulatory risks by not requiring active DER oversight of all remediations. DER hopes that eliminating several possible reporting steps will streamline the clean-up process, thereby allowing remedial funds to be spent on actual cleanups, rather than on report generation.

The CAP Regulations do not simply address the necessary method of corrective action. The regulations also clarify the Tank Act's water replacement obligation.¹⁴⁴ The regulations require any responsible party affecting or diminishing a water supply as a result of a release to replace the affected supply with an equivalent supply.¹⁴⁵ Furthermore, the regulations require that the responsible

136. *Id.* § 245.310.

137. *Id.* § 245.310(a)(4)(v)(A)-(G).

138. See generally 40 C.F.R. § 112. For a further discussion of closure liability, see *infra* notes 220-40 and accompanying text.

139. 25 PA. CODE § 245.311(a).

140. *Id.* § 245.311(c).

141. *Id.* § 245.312(a).

142. *Id.* § 245.313(a).

143. 25 PA. CODE § 245.313(c).

144. *Id.* § 245.307.

145. *Id.* § 245.307(a).

party provide a temporary water supply within forty-eight hours of a release,¹⁴⁶ and provide a permanent water supply within ninety days of a release.¹⁴⁷ Each of these requirements are to be fulfilled at no cost to the owner of the affected water supply.¹⁴⁸ In order to encourage connection to DER regulated public water systems, the regulations allow a responsible party to completely satisfy their water replacement obligation by providing a connection to a public water supply.¹⁴⁹ If this option is implemented, there is no continuing obligation to pay the water bills charged to the user by the public system.¹⁵⁰

The CAP Regulations also address DER's concern with the length of time contaminated soil piles remain at tank removal sites. These aesthetically displeasing piles prove to be the source of numerous complaints. In addition, traditional soil storage practices are generally inadequate to prevent erosion, and allow vapor emissions to escape from the piles into the atmosphere. Plastic covers, if installed at all, do not solve the erosion and emission problems because they are often poorly maintained, and fail in the first windstorm. The CAP Regulations address the soil pile problems by allowing on-site storage of excavated soil for up to ninety days,¹⁵¹ provided that the soil piles are necessary, properly handled, and do not present any danger to human health and the environment by their presence.¹⁵² If the soils are to be kept on site for a period longer than ninety days, the responsible party must at a minimum submit, within ninety days of the initial release or discovery of release, a proposal for permanent treatment or disposal, either on or off-site.¹⁵³ If the soils are classified as hazardous waste, there is no exception to the ninety day requirement.¹⁵⁴

C. Certification of Tank Installers and Inspectors

The Tank Act authorizes DER to establish a certification program for tank installers and inspectors.¹⁵⁵ Accordingly, most tank

146. *Id.* § 245.307(c).

147. 25 PA. CODE § 245.307(d).

148. *Id.* § 245.307(a).

149. *Id.* § 245.307(b).

150. *Id.*

151. 25 PA. CODE § 245.308(c).

152. *Id.* § 245.308(b).

153. *Id.* § 245.308(c).

154. *Id.* § 262.34. For a discussion of the possible hazardous waste status of contaminated soils, see *infra* notes 226-28 and accompanying text.

155. 35 PA. CONS. STAT. ANN. § 6021.107(d).

handling activities, including construction, modification, and removal, must be performed by a certified installer.¹⁵⁶ The certification program promulgated by DER represents an attempt to use the private sector to ensure quality control at storage tank installations, thereby avoiding the need to hire a large number of field inspectors to perform this same work. It is not yet clear whether DER's approach will succeed.

In September 1991, DER published regulations governing the certification of tank inspectors and installers.¹⁵⁷ These regulations establish twenty-four separate categories of certified installers,¹⁵⁸ and four categories of inspectors.¹⁵⁹ Under the regulations, both interim certified installers, inspectors and the companies they work for were required to attain temporary certification based on their experience and training by March 1992.¹⁶⁰ Also, all temporarily certified installers and inspectors who passed a written examination administered by DER and who demonstrated adequate experience by September 1994, would be granted permanent installer certification.¹⁶¹ A training program and a written examination have been developed for installers and inspectors, and the first certification examination was administered in November 1993.

Presently, DER is considering a number of changes to the certification regulation. Minor changes are contained in a regulatory package which was published in final form in August 1994.¹⁶² Other more fundamental changes are being contemplated. These changes may include a drastic reduction in the number of certification categories and substantial limitations on the requirements for certified inspector oversight of tank handling activities.

D. The Permitting Program

While a permit will eventually be required for all regulated tanks,¹⁶³ DER is still considering the ultimate shape and scope of the permitting program. Some elements of the eventual program are mandated by the Tank Act, while others are left to agency discretion. Given the large numbers of facilities, the various sizes of facilities, and the sophistication of the facility owners, DER hopes to

156. *Id.* § 6021.501(c)(2).

157. 21 Pa. Bull. 4345 (Sept. 21, 1991).

158. 25 PA. CODE § 245.110(b).

159. *Id.* § 245.112.

160. *Id.* §§ 245.103(b), 121.

161. *Id.* § 245.103(c).

162. 24 Pa. Bull. 2389, 2395-96 (proposed May 7, 1994).

163. *See* 35 PA. CONS. STAT. ANN. §§ 6021.304(a), .504(a).

make the permitting process as concise and painless as possible. However, the thrust of the permit program will be directed towards two goals: ensuring that tank facilities are constructed and operated in a manner that minimizes the chances of a release, and detecting and removing any release as quickly as possible.

Prior to adopting a final permitting program, the Tank Act authorized DER to implement an interim permit program.¹⁶⁴ An interim permit program is now underway and is being implemented on a region-by-region basis.¹⁶⁵ According to the Act, tank owners who are subject to the standards set forth in the statute, and can demonstrate compliance with those standards, are automatically deemed to possess interim permits.¹⁶⁶ DER requests that each tank owner provide a certification of compliance. Owners who are able to certify that they are in compliance with the interim permit requirements are deemed to have permits.¹⁶⁷ At present, DER is not issuing written permit documents. Tank owners whose tanks were installed before the effective date of the Tank Act, and who have valid State Police Fire Marshal permits, are automatically deemed to have interim permits.¹⁶⁸ DER is allowing those owners who have misplaced their Fire Marshal permits to reapply for new Fire Marshal permits.

Tank owners with USTs, which have been installed or upgraded after December 22, 1988, must demonstrate that they are in compliance with the federal technical requirements.¹⁶⁹ These standards were adopted by DER as state regulations.¹⁷⁰ Consequently, a "substantial modification" to existing USTs will not trigger an obligation to meet the standards for new tanks.¹⁷¹ Except for new installations, which must meet the federal standards, UST owners have until December 22, 1998, to upgrade their tanks to a level that will fulfill these new standards.¹⁷² Moreover, because DER has, in

164. See 35 PA. CONS. STAT. ANN. § 6021.107(b).

165. See generally DER Fact Sheet, *supra* note 54 (explaining requirements of DER's interim permit program).

166. 35 PA. CONS. STAT. ANN. §§ 6021.302(b), .502(b). It has proven impossible to design an interim permit program that complies precisely with all of the statutory mandates. This problem is due in part both to inconsistencies in the statute and to DER's delays in attempting to create an interim permit program.

167. *Id.* §§ 6021.504(f), .304(f).

168. *Id.* §§ 6021.504(d), .304(d).

169. See 40 C.F.R. §§ 280.20.

170. 25 PA. CODE § 245.2. These regulations supersede the upgrade trigger contained in 35 PA. CONS. STAT. ANN. § 6021.502(b).

171. For upgrade requirements for existing tanks, see 40 C.F.R. § 280.21.

172. 40 C.F.R. § 280.21(a).

the course of adapting the federal regulations, narrowed the scope of what is considered a commercial heating oil tank by applying the "space heating" criteria¹⁷³ in Pennsylvania, the federal upgrade requirements apply to some tanks that would otherwise be exempt. Therefore, Pennsylvania tanks containing fuel oil used for power generation are subject to the federal upgrade requirements.¹⁷⁴

Although UST owners have until December 22, 1998 to upgrade existing tanks, the federal leak detection requirements¹⁷⁵ apply to all Pennsylvania USTs except commercial heating oil tanks. DER may exercise discretion in enforcing this requirement against USTs that are regulated in Pennsylvania, rather than by the federal UST statute. For commercial heating oil tanks as defined in Pennsylvania, which are not subject to the federal regulations, DER decided not to implement the interim permitting program. This decision was based on the 1992 legislative limitations placed on regulation of this class of tanks,¹⁷⁶ coupled with DER's belief that strict enforcement of the Tank Act's interim requirements on commercial heating oil tanks could discourage owners from conducting repairs or partial upgrades.

ASTs installed or substantially modified after August 5, 1989, are required to comply with the interim standards set forth in the Tank Act.¹⁷⁷ These standards incorporate by reference a group of American Petroleum Institute and Underwriters Laboratory standards.¹⁷⁸

Some owners will be unable to certify their compliance with the applicable standards. DER will select some of these potentially noncompliant facilities for inspection, and will require the owners or operators of these facilities to hire certified inspectors. In addition, a certain number of apparently compliant facilities will be subject to the inspection requirement. DER estimates that the compliance rate among federally regulated tank facilities is possibly as low as ten percent. Much of the noncompliance, which exists even at the most modern facilities, is the result of record keeping violations, particularly with the federally mandated leak detection requirements.¹⁷⁹ Since the primary purpose of keeping records is to allow early detection of leaks, DER places a high priority on

173. See 25 PA. CODE § 245.1.

174. 40 C.F.R. § 280.21.

175. See *id.* §§ 280.41, .43.

176. See 25 PA. CODE § 245.1.

177. 35 PA. CONS. STAT. ANN. § 6021.302(b).

178. *Id.*

179. 40 C.F.R. §§ 280.41, .43.

bringing facilities into compliance with the federal standards. If DER's approach is successful, the certified inspectors will assist the owners in identifying their deficiencies and will bring these facilities into compliance with all applicable requirements.

Due to the suspected level of noncompliance, DER believes that education and outreach efforts are required before utilizing the full range of enforcement authority. Accordingly, the agency will make efforts to avoid the use of formal enforcement actions for interim permit violations, unless formal enforcement is warranted by the particular circumstances. Noncompliance with interim permit standards, however, may jeopardize facility eligibility for USTIF coverage in the event of a release. DER has no control over the Board's determinations of eligibility, and cautions that the financial impact of losing this protection may be far more severe than any penalties DER is likely to impose for violations.

E. Financial Responsibility Regulations

1. *USTIF and the Board*

The Board is a state agency which provides coverage that resembles insurance, the terms of which are created by statute.¹⁸⁰ It was originally anticipated that coverage by the USTIF would be contingent upon a showing of no preexisting contamination at a site prior to the release for which coverage is claimed.¹⁸¹ However, recent discussions between DER and the Board suggest that the Board will consider pro-rating coverage where a release commenced before February 1, 1994, and continued into the coverage period. In addition, the Tank Act allows the Board to deny coverage for facilities that are not in compliance with registration or permitting requirements.¹⁸² Although the Board is authorized to establish additional criteria for eligibility,¹⁸³ this authority is rarely exercised. This area promises to be a fruitful field of practice in the years to come.

The Board, not DER, controls fee assessment and money disbursements from USTIF.¹⁸⁴ Fee levels for all tanks, except diesel and heating oil tanks, are set at one hundred dollars for each tank, plus an additional two cents per gallon of product placed into the

180. 35 PA. CONS. STAT. ANN. §§ 6021.704-705.

181. *Id.* § 6021.706(5).

182. 35 PA. CONS. STAT. ANN. § 6021.706(3)-(4).

183. *Id.* § 6021.706(6).

184. *See* 35 PA. CONS. STAT. ANN. § 6021.705.

tank.¹⁸⁵ Diesel and heating oil tanks are assessed an annual capacity fee,¹⁸⁶ currently, at fifteen cents per gallon of tank capacity.

2. *Financial Responsibility Regulation Proposal*

DER has promulgated regulations concerning tank owners' obligations to maintain adequate financial resources to satisfy deductible requirements.¹⁸⁷ These regulations are driven by similar federal requirements establishing an obligation for UST owners or operators to have financial resources of \$500,000 both for corrective action and third-party liabilities.¹⁸⁸ DER maintains that most responsible owners who are able to maintain their tanks in compliance with DER regulations should be able to afford \$10,000 in combined deductibles annually. Consequently, although the agency is preparing a regulation which would obligate responsible owners to maintain the financial resources necessary to meet the deductibles, it does not specifically require that these funds be held solely for this purpose. Furthermore, DER reserves the right to obtain evidence of adequate financial resources,¹⁸⁹ but has decided to avoid creating another periodic reporting obligation.

DER believes that the potential availability of USTIF funds will provide a sufficient incentive for tank owners to raise the necessary funds in case of a release. Given the potential loss in the value of an owner's investment caused by the diminution in property values after a release, and the prospect of restoring these values through a USTIF funded cleanup, DER is confident that this position is justified. Moreover, the agency hopes that its approach will allow tank owners to comply with the federal mandates for financial responsibility without causing an undue burden on their capital resources.

IV. FEDERAL REGULATIONS

A. Federal Technical Standards

In 1988, EPA promulgated a set of technical regulations governing construction standards, leak detection methods, release investigation and reporting procedures, and corrective action and financial responsibility requirements.¹⁹⁰ Pennsylvania does not have official program delegation from the federal government, so EPA's

185. 25 PA. CODE § 971.2(1)(i)-(ii).

186. *Id.* § 973.6.

187. 24 Pa. Bull. 2389, 2392-93 (proposed May 7, 1994).

188. 40 C.F.R. § 280.93(a)(2).

189. *See generally* 35 PA. CONS. STAT. ANN. § 6021.107(c).

190. 40 C.F.R. § 280.

regulations are technically still in force in Pennsylvania. In addition, the federal regulations for tank testing, leak detection, and tank replacement are incorporated by reference in Pennsylvania regulations.¹⁹¹

Since the federal regulations allow the "implementing agency" to impose requirements that vary in detail from the federal requirements, the inconsistencies between the adopted federal regulations and DER's own regulations are permissible.¹⁹² For example, the federal corrective action and leak reporting requirements have been superseded, according to DER, by the CAP Regulations.¹⁹³ Similarly, EPA's requirements for maintaining financial responsibility have been superseded by DER's regulations.¹⁹⁴ While DER does not have official program delegation, it appears that EPA generally defers to DER's program, and does not superimpose its own requirements where DER's program is equivalent.

The federal technical requirements establish a timetable for upgrading or replacing most existing USTs. By December 22, 1998, all tanks subject to the federal regulations must meet the federal requirements for corrosion protection, spill and overflow prevention, and leak detection.¹⁹⁵ Hazardous substance tanks are also subject to a requirement for double-wall construction or some other form of secondary containment.¹⁹⁶

Perhaps the most confusing provisions of the federal regulations are those which deal with leak detection.¹⁹⁷ The regulations allow various methods of leak detection, and the requirements differ depending on the age of the tanks and the type of piping used.¹⁹⁸ The most common method is inventory reconciliation combined with periodic tank tightness testing. Other methods of leak detection include the use of automatic leak detection equipment, monitoring wells with vapor detection or ground water sampling, and interstitial monitoring of a secondary containment zone or double-wall interstitial space.¹⁹⁹ Each of these requirements is coupled with the record keeping mandate.

191. See 25 PA. CODE § 245.2 (incorporating federal tank regulations with several exceptions).

192. See generally 40 C.F.R. § 280.

193. See 25 PA. CODE §§ 245.303, .305.

194. See 24 Pa. Bull. 2389, 2392-93 (promulgated in August, 1994).

195. 40 C.F.R. §§ 280.20, .30, .41, .43.

196. *Id.* § 264.193(d).

197. *Id.* §§ 280.41, .43.

198. 40 C.F.R. §§ 280.41, .43.

199. *Id.* § 280.43.

B. Differences Between the Pennsylvania and Federal Programs

The federal and Pennsylvania regulatory programs differ somewhat in scope with respect to underground tanks. The Pennsylvania Tank Act regulates commercial heating oil tanks larger than 3000 gallons where the fuel is "for consumptive use on the premises."²⁰⁰ Similar tanks are excluded from the federal program.²⁰¹ DER also narrowed the category of commercial heating oil tanks by limiting the definition of heating oil to that "used to provide space heating."²⁰² Consequently, tanks storing fuel used for power generation are not considered heating oil tanks by DER. By comparison, the federal regulations exclude coverage of heating oil tanks where the fuel is "used for consumptive use on the premises."²⁰³ EPA includes tanks used to provide fuel for power generation in this category.²⁰⁴

Additionally, unlike EPA, DER does not allow used oil to be treated as heating oil.²⁰⁵ DER regulations governing used oil collection and use make it clear that used oil cannot be freely substituted for regular grades of heating oil. This variance in definitions has caused some confusion, particularly with respect to the application of the federal regulations governing construction standards and leak detection. The confusion is compounded by the 1992 amendments to the Tank Act. These amendments withhold DER's authority to promulgate any regulations affecting commercial heating oil tanks until January 1996.²⁰⁶ In response, DER applies the adapted federal regulations to all state regulated USTs except those tanks which meet the state's definition of commercial heating oil tanks.²⁰⁷ Therefore, some tanks which might be treated by the federal government as exempt commercial heating oil tanks will be subject to federal regulations, as applied in Pennsylvania.

Certain regulated tanks are exempt from federal regulations, and some of these requirements are deferred as to other tanks.²⁰⁸

200. See 25 PA. CODE § 245.1.

201. See 40 C.F.R. §§ 280.10, .12.

202. See 25 PA. CODE § 245.1.

203. See 40 C.F.R. §§ 280.10, .12.

204. See *id.*

205. Compare 40 C.F.R. § 280.12 with DEPARTMENT OF ENVIRONMENTAL RESOURCES, DIVISION OF STORAGE TANKS, PROGRAM GUIDANCE NO. 8.2.2 (April 27, 1994) (limiting the term "heating oil for consumptive use" to only heating oil to provide space heating).

206. 35 PA. CONS. STAT. ANN. § 6021.505.

207. See DEPARTMENT OF ENVIRONMENTAL RESOURCES, DIVISION OF STORAGE TANKS, PROGRAM GUIDANCE NO. 8.2.2 (April 27, 1994).

208. 40 C.F.R. § 280.10.

However, since DER has not adopted the exclusions and deferrals built into the federal regulations, tanks which would have enjoyed the benefit of these exclusions or deferrals are required to comply with the federal technical requirements as applied in Pennsylvania.²⁰⁹ The affected tanks include tanks containing *de minimus* concentrations of regulated substances, field constructed USTs, and emergency generator tanks.²¹⁰

C. Financial Responsibility

The federal regulations require UST owners to demonstrate that they have the financial ability to pay up to \$500,000 in corrective action costs and up to \$500,000 in bodily injury and personal injury costs.²¹¹ These regulations are designed to be phased in and first applied to the owners of the largest numbers of tanks. For example, owners of twelve or more tanks were required to show financial responsibility by December 31, 1993.²¹²

Pennsylvania's state-run financial responsibility program went into effect on February 1, 1994. The one month gap between the federal and Pennsylvania's deadlines may create some problems because few of the state's small tank owners will be able to comply with EPA's financial responsibility mandate. Yet it appears that neither EPA nor DER is willing to expend resources to seek violators lacking coverage during the month of January 1994. Similarly, the larger gap between the onset of the federal financial responsibility requirement and the promulgation of a final DER financial responsibility regulation should not create undue difficulties. DER cannot, however, predict how EPA will handle this issue.

D. ASTs and Bulk Storage Facilities

Presently, there are no federal technical standards for ASTs. Yet there are regulations, both existing and proposed, that affect oil bulk storage facilities including many AST installations.²¹³ These regulations require certain bulk oil storage facilities to prepare Spill Prevention Control and Countermeasure Plans ("SPCC Plans").²¹⁴ Under the authority of the Oil Pollution Act of 1990,²¹⁵ EPA pro-

209. See 25 PA. CODE § 245.2. Proposed amendments to certification regulations will eliminate many of these differences.

210. 40 C.F.R. § 280.10.

211. *Id.* § 280.93(a)(2).

212. *Id.* § 280.91(d).

213. See *id.* § 112.

214. 40 C.F.R. § 112.3.

215. Oil Pollution Control Act of 1990, 33 U.S.C. §§ 2701-19 (Supp. V 1993).

posed two sets of regulations. Both would modify or add to the federal regulations.²¹⁶ The first proposal would essentially rewrite the existing regulation.²¹⁷ The second proposal which became final in July, 1994, requires non-marine, transportation-related bulk petroleum facilities which might have a release that would cause "substantial harm" or "significant and substantial harm," to prepare spill response plans which are to be coordinated with national, regional and area contingency plans.²¹⁸ These spill response plans must be adequate to contend with various levels of release, including a "worst case discharge."²¹⁹

V. DER POLICIES AND GUIDANCE

A. New UST Closure Guidance

In December 1993, DER released a document²²⁰ to provide guidance on what the agency considers to be appropriate practice for UST closures.²²¹ This document also discusses the closure and release notification processes,²²² the recommended procedures for tank removal and associated waste handling activities,²²³ the site assessment to determine whether there has been a release,²²⁴ and the elements of the closure report that must be submitted to DER.²²⁵ In addition, the closure guidance document describes the dividing line between tank closure and the corrective action process under the CAP Regulations.²²⁶ Most tank closures reveal some level of

216. 40 C.F.R. § 112. A detailed discussion of Oil Pollution Act of 1990 requirements and regulations is beyond the scope of this article. For a further discussion concerning the status of the regulations, see U.S. Coast Guard, *Oil Pollution Act of 1990 Update* (copies may be obtained by writing the Coast Guard at "Commandant (G-MS), USCG, 2100 Second St. S.W., Washington, D.C. 20593-0001, Attn. Update Editor").

217. 56 Fed. Reg. 54,612 (1991) (to be codified at 40 C.F.R. pt. 112) (proposed Oct. 22, 1991).

218. 59 Fed. Reg. 34,070 (1994) (to be codified at 40 C.F.R. pt. 112) (proposed Feb. 17, 1993).

219. *Id.*

220. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, STORAGE TANK PROGRAM, TECHNICAL DOCUMENT, CLOSURE REQUIREMENTS FOR UNDERGROUND STORAGE SYSTEMS (1993) [hereinafter NEW CLOSURE GUIDANCE]. NEW CLOSURE GUIDANCE replaces PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, DIVISION OF PERMITS & COMPLIANCE, BUREAU OF WATER QUALITY MANAGEMENT, PENNSYLVANIA CLOSURE/CHANGE-IN SERVICE/SITE ASSESSMENT/REMEDIATION (1990).

221. NEW CLOSURE GUIDANCE, *supra* note 220, at 2-4.

222. *Id.* at 4-7, 11.

223. *Id.* at 7-11.

224. *Id.* at 12-19.

225. NEW CLOSURE GUIDANCE, *supra* note 220, at 20-23.

226. *Id.* at 22.

contamination, however, in many cases, this is easily managed by removing contaminated soils. In order to avoid forcing too many closures into corrective action, DER decided that contamination which is confined to the original tank excavation backfill may be dealt with as part of the tank closure.²²⁷ The site characterization and subsequent remedial requirements of the CAP Regulations need only be invoked when contamination migrates beyond the original backfill.²²⁸

The closure guidance document provides a detailed discussion of the procedures to be followed during a tank closure. Safety considerations, the need for certified tank handlers, and sampling and reporting protocols are covered in great detail.²²⁹ A matrix of analytical requirements is provided for most substances likely to be encountered.²³⁰ In addition, the document provides references to the various provisions of the residual and hazardous waste regulations which are applicable to the disposal of tank bottoms, the tanks themselves, and contaminated soils or other media. These requirements include the potential need for hazardous waste characterization of unusable product, tank bottoms and sludges.²³¹ Furthermore, these requirements address the need to clean the tank and piping to avoid the potential for hazardous waste characterization of these components.²³²

Cleaned tanks and piping may be considered scrap metal if they are actually recycled.²³³ If not recycled, they may be subject to the hazardous waste characterization requirements and also possibly to hazardous waste transportation requirements.²³⁴ If they are not hazardous waste, they would be deemed residual waste, and subject to the residual waste requirements.²³⁵ Useable product removed from a tank may be reused without additional requirements.²³⁶

227. *Id.* at 14.

228. *Id.* at 14-15.

229. NEW CLOSURE GUIDANCE, *supra* note 220, at 5, 20-22.

230. *Id.* at 21.

231. *Id.* at 8.

232. *Id.*

233. 25 PA. CODE § 261.4(a)(21).

234. *See id.* § 263.

235. *Id.* §§ 299.211-19. It is not entirely clear whether the "petroleum contaminated media and debris" exclusion from hazardous waste status applies to tanks and piping. *See id.* § 261.4(a)(17).

236. NEW CLOSURE GUIDANCE, *supra* note 220, at 8.

Soils contaminated with virgin petroleum products are generally regulated as residual waste.²³⁷ Soil contaminated with products that appear on the hazardous waste lists of commercial chemical products, however, may be regulated as hazardous wastes.²³⁸ For the most part, soil contaminated with commercial fuel products such as gasoline, diesel, and heating oils is covered by the petroleum contaminated media and debris exclusion from hazardous waste characterization.²³⁹ Yet, soil contaminated by some petroleum products, such as refined benzene and toluene, may not be covered by this exclusion.

DER prepared a standard set of forms for closure reports.²⁴⁰ These forms are intended to assist the tank owners and removal contractors in providing the information needed by the agency in assessing the adequacy of a tank closure. In addition, by providing a standardized format for closure reports, DER hopes that reviewing these reports will be somewhat easier and less time consuming.

B. Cleanup Standards for Contaminated Soils

DER recently revised and expanded its interim guidelines for treatment and disposal of contaminated soils. In December 1993, the agency issued a document to provide guidance on generic cleanup levels for a number of various organic and inorganic contaminants commonly encountered in soil.²⁴¹ Specific criteria are established for hydrocarbon components, including benzene, ethylbenzene, toluene, and xylene.²⁴² In addition, a criterion is established for petroleum hydrocarbon ("PHC") contamination from virgin petroleum products.²⁴³ Recently, criteria for methyl tertiary butyl ether were developed, and will be added to future printings of the soil standards guidance. The issuance of these standards is based on the recognition that the elimination of all soil contaminants is difficult, if not impossible, in most cases. In addition, there may be some residual contamination levels in soils which present no measurable threat to groundwater, human health or the envi-

237. 25 PA. CODE §§ 261.4(a)(17), 287.2(c)(4).

238. NEW CLOSURE GUIDANCE, *supra* note 220, at 8.

239. 25 PA. CODE § 261.4(a)(17).

240. NEW CLOSURE GUIDANCE, *supra* note 220, at Attachments 2-4.

241. PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, CLEANUP STANDARDS FOR CONTAMINATED SOILS (Dec. 1993) [hereinafter SOIL STANDARDS GUIDANCE]. This document supercedes PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, TECHNICAL BACKGROUND DOCUMENT, GROUND WATER POLLUTION CRITERIA FOR VIRGIN FUEL CONTAMINATED SOIL (Oct. 11, 1991).

242. SOIL STANDARDS GUIDANCE, *supra* note 241, at 8-10.

243. *Id.* at 10.

ronment. Since this is one area of science which is still being developed, ongoing research is likely to refine these standards.

The new cleanup levels set forth in the soil standards guidance are somewhat less stringent than previous standards. It is not entirely clear, however, that old standards have lost all viability. For example, the new standards were intended to assess on-site remediations, yet it is not certain that DER will allow soils that meet the new standards, but which fail to meet old standards, to be freely used off-site as clean fill. Contaminated soils that meet the soil cleanup standards remain residual waste.

C. Program Guidances

DER commenced drafting a series of program guidance documents which focus on issues that have proved troublesome over the last four years. These guidances are intended to increase the level of consistency between regional office interpretations concerning these issues. Some of these guidances focus on defining the scope of the regulated community of tanks, particularly in grey areas where the statute and regulations do not provide clear direction. Others set forth procedures that the regional and central offices are to follow for handling registration and other administrative issues. Several guidances address technical issues such as containment standards for ASTs,²⁴⁴ upgrade requirements for USTs,²⁴⁵ and regulatory requirements for heating oil tanks.²⁴⁶ DER expects to continue drafting such guidances in the future.

VI. CONCLUSION

DER has undertaken an ambitious regulatory program, and implementation of the program has not always been smooth. DER believes, however, that it is swiftly addressing the myriad of problems associated with both aboveground and underground tanks. In the future, the agency expects to draft regulations and guidances as needed in order to flesh out the statutory guidelines set forth by the Tank Act. In drafting these regulations, DER will apply the lessons learned over the past five years of administering the tank program. The direction taken by DER will be influenced

244. At present, the Southeastern regional office of DER is handling the issue on a case-by-case basis, and requests that it be advised of proposed off-site uses.

245. DEPARTMENT OF ENVIRONMENTAL RESOURCES, DIVISION OF STORAGE TANKS, PROGRAM GUIDANCE NO. 9.4.1 (December 23, 1993).

246. DEPARTMENT OF ENVIRONMENTAL RESOURCES, DIVISION OF STORAGE TANKS, PROGRAM GUIDANCE NO. 8.2.1 (April 27, 1994).

by a number of external factors, including the policies of Governor Ridge's administration, the resulting shifts of the agency's executive direction, and the possibility of legislative changes which may redefine the scope of the regulated tank population. If anything is certain, it is the prospect for change.

