

**Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
25 Pa. Code Ch. 245
Administration of the Storage Tank and Spill Prevention Program**

Order

The Environmental Quality Board (Board) by this order amends 25 Pa. Code, Chapter 245 (relating to Administration of the Storage Tank and Spill Prevention Program).

This order was adopted by the Board at its meeting of _____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. Contact Persons

For further information, contact Charles M. Swokel, Chief, Division of Storage Tanks, P.O. Box 8763, Rachel Carson State Office Building, Harrisburg, PA 17105-8763, (717) 772-5806; or Kurt Klappkowski, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department's website (<http://www.depweb.state.pa.us>).

C. Statutory Authority

The rulemaking is being made under the authority of section 106 of the Storage Tank and Spill Prevention Act (act) (35 P.S. § 6021.106), which authorizes the Board to adopt rules and regulations governing aboveground and underground storage tanks to accomplish the purposes and carry out the provisions of the act; section 501 of the act (35 P.S. § 6021.501), which authorizes the Department of Environmental Protection (Department) to establish program requirements for underground storage tanks; and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to formulate, adopt and promulgate rules and regulations that are necessary for the proper work of the Department.

D. Background of the Amendments

The Board established the initial rulemaking governing administration of the storage tank and spill prevention program with its final-form publication of Chapter 245, Subchapter A and Subchapter B (relating to general provisions; and certification program for installers and inspectors of storage tanks and storage tank facilities) on September 21, 1991, at 21 Pa.B. 4345. In that initial rulemaking, Federal requirements in 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of underground storage tanks) were adopted by reference in Subchapter A. Comprehensive underground storage tank regulations were established in Chapter 245 when the Board adopted Subchapter E in 1997 (27 Pa.B. 5341, October 11, 1997). The Board last amended Subchapter E in 2007, when several underground storage tank provisions contained in the Federal Energy Policy Act of 2005 (August 8, 2005, Pub. L. No. 109-58, 119 Stat. 594) (EPAAct) were adopted (37 Pa.B. 5965, November 10, 2007). The most significant provision in this final-form rulemaking addresses underground storage tank operator training requirements and codifies the last provision of the EPAAct relating to underground storage tanks that needs to be addressed by the Department. Provisions for training course and trainer approvals, along with provisions for mandatory training or retraining of underground storage tank owners and operators whose tank systems are determined to be out of compliance as a result of an inspection, are already contained in current Chapter 245 regulations.

The proper conduct of operations, maintenance, and related recordkeeping for underground storage tanks has been a problem in Pennsylvania and nationally. The Department has noted particular compliance concerns relating to routine leak detection monitoring, periodic testing of monitoring equipment and corrosion protection systems, and maintenance. The operator training provisions in this rulemaking will help to significantly improve underground storage tank operations, maintenance, record keeping and related compliance with Pennsylvania and federal underground storage tank regulatory requirements, which will protect the citizens and the environment of this Commonwealth.

Establishment of an operator training program is necessary to comply with federal operator training grant guidelines issued by the U.S. Environmental Protection Agency (EPA) on August 8, 2007. Section 9010 of Subtitle I of the Solid Waste Disposal Act (Subtitle I), as amended by Section 1524 of the EPAAct (42 U.S.C. § 6991i), required EPA to develop and publish guidelines for states to establish training requirements for underground storage tank operators. This section also requires that states receiving federal funds under Subtitle I develop state-specific regulatory training requirements consistent with the EPA guidelines by August 8, 2009 or be well underway in that process. Pennsylvania receives federal funding under Subtitle I in the form of the Underground Storage Tank and Leaking Underground Storage Tank Trust Fund grants. Additionally, the guidelines require states to ensure that all three classes of operators are trained according to state-specific training requirements by August 8, 2012. Failure to establish an effective operator training program in Pennsylvania would jeopardize current EPA state program approval and substantial funding provided to the Department under Subtitle I. For federal fiscal year 2009, the Department received \$2.79 million in federal funds from EPA for the Underground Storage Tank and Leaking Underground Storage Tank (cleanup) programs.

The final-form rulemaking amends existing § 245.422(e) (relating to upgrading of existing underground storage tank systems) to clarify that containment is required when replacing an existing product dispenser that involves a major modification.

The final-form rulemaking also amends § 245.435(b) (relating to reporting and recordkeeping) to clarify the timeframe for retention of temporary records and to correct errors on the retention of cathodic protection documents. This subsection also adds operator training documents to the temporary recordkeeping requirements.

The final-form rulemaking adds § 245.436 (relating to operator training) to existing regulations. This section establishes three distinct classes of underground storage tank operators and related training requirements. It includes the general requirements for trained operators (subsection (a)), descriptions of the classes of storage tank operators to be trained (subsection (b)), required and acceptable forms of training for each class of operator (subsection (c)), deadlines for new and existing operators to meet the training requirements (subsection (d)), and documentation requirements (subsection (e)).

The Department worked with the Storage Tank Advisory Committee (STAC) during development of this rulemaking. The Department also met with underground storage tank owners, operators and manufacturers; associations and groups, such as the Pennsylvania Petroleum Marketers and Convenience Store Association; the Tank Installers of Pennsylvania; and the Agricultural Advisory Board. The STAC, which was established by section 105 of the act (35 P. S. § 6021.105), consists of persons representing a cross-section of organizations having a direct interest in the regulation of storage tanks in this Commonwealth. As required by section 105 of the act, the STAC has been given the opportunity to review and comment on the final-form rulemaking and to review comments received on the proposed rulemaking. On June 9, 2009, the STAC voted to support the amendments and recommended that the Board consider the amendments for publication as final-form rulemaking. A listing of STAC members and minutes of STAC meetings are available on the Department of Environmental Protection's website at www.depweb.state.pa.us and may also be obtained from Charles M. Swokel, whose contact information appears in Section B of this preamble.

E. Summary of Changes to and Comments and Responses on the Proposed Rulemaking

The Board received comments on the proposed rulemaking from six commentators. Five individuals submitted comments during the 30-day public comment period, subsequent to the notification of availability published at 39 Pa.B. 1300 (March 14, 2009). The Department provided the Independent Regulatory Review Commission (IRRC) with all comments received during the public comment period. On May 13, 2009, IRRC submitted written comments to the Board. Based on the comments received, several changes have been made in the final-form rulemaking.

One commentator felt that compliance costs included in the preamble of the proposed rulemaking may be understated and did not address travel and labor costs associated with attending an operator training course. The Board recognizes that additional travel and labor costs could be incurred. However, the upper range of the rate shown for national trainers was for onsite training. Since the proposed rulemaking was published, some national trainers have started providing computer-based interactive operator training courses at even lower rates than projected in the preamble. See Section F, Compliance Costs, below. The Board believes that market factors and national demand for training operators will ensure that training costs are competitive and reasonable.

Two commentators raised concerns that the proposed rulemaking may not meet EPA guidelines for operator training because the proposal does not provide for retraining or mandatory training of storage tank operators when a facility is determined to be out of compliance with regulatory requirements. Since existing regulations already contain provisions in § 245.411(d) for mandatory training or retraining of owners and operators, when a facility is determined to be out of compliance, the Board does not see a need to further amend the regulation on retraining. The existing regulations cover any formal retraining of owners and operators that may be required.

The Department may also rely on certified third-party inspectors or Department staff to provide instructions to operators during a facility inspection process for minor infractions, such as where on-the-spot corrections can be made or when the operator can provide documentation within a certain timeframe to the inspector that demonstrates compliance. This less formal training process should satisfy retraining requirements for minor infractions, so long as it measures the operators understanding of regulatory requirements, achieves compliance for the noted infractions and is documented on the inspection report or other enforcement records. The Board believes that the EPA guidelines allow for such flexibility when determining compliance and providing retraining specific to minor or limited infractions, as determined by the Department.

Two commentators complimented the Department on efforts to establish the rulemaking and one recommended that the provision on availability of Class A and Class B operators be retained as proposed. The Board appreciates the comments, and the provision is retained.

One commentator raised concerns about what constitutes a “manned facility” and recommended that definitions be added for manned and unmanned facilities and for determining when a facility is in operation that requires a Class C operator to be onsite. The Board recognizes this concern and has changed § 245.436(a)(ii) in the final-form rulemaking to clarify this issue and to reference 37 Pa. Code Chapter 13 (relating to storage and use of flammable and combustible liquids), which stipulates requirements for onsite operators when dispensing fuel for retail sales to the general public.

One commentator indicated that Class A operators may not make routine management decisions as indicated in § 245.436(b)(1), but may advise the tank owner or management on such matters. The Board has changed the routine requirements in this section to indicate that Class A operators “typically” have certain management responsibilities, thus implying that other methods of handling these responsibilities, such as advising management, may also be acceptable.

Two commentators were concerned that Department-certified entities should not be allowed to serve as operators and expressed that contracting the Class A operators position may pose safety concerns. The Board does not agree with the commentators that Department-certified entities should not be allowed to serve as operators or that contracting these functions poses safety concerns. However, the Board does believe that when designated as Class A or Class B operators, Department-certified entities should maintain current IUM or UMX certification categories or complete the same formal training as other operators. Therefore, the final-form rulemaking requires that Department certification must be “current” in § 245.436(b)(1) and (2) for Department-certified entities when designated as the Class A operator, the Class B operator or both.

Several commentators raised concerns about Class C operator notification and use of environmental hot-line representatives for notification in emergencies. One of the commentators felt the proposed rulemaking was vague on instances when notification must be made. The Board recognizes these concerns and has included changes in § 245.436(b)(3) and (e)(3) of the final-form rulemaking that notification should be “based on the nature and type of emergency” and that Class C operator “or owner contact information includingemergency procedures” shall be posted at unmanned facilities. This helps to clarify that an emergency hot-line representative may be used to satisfy notification, provided that written emergency procedures are provided that adequately address the process. The proposed rulemaking text also allows the hot-line representative to be designated as a Class C operator (additional, alternate or primary), if needed.

One commentator was concerned that maintaining lists of trained operators will be difficult and time-consuming, given the commentator’s experience with the high turnover of Class C operators. This commentator and another commentator also believe that the proposed rulemaking should further clarify retention requirements for operator training documents maintained off-site, such as for unmanned facilities. The Board believes that maintaining current lists of designated operators and other related documents is necessary and appropriate to identify the trained operators responsible for each underground storage tank facility. Retaining documentation at a readily available off-site location is already clarified in § 245.435(b) of the existing regulation, which is referenced in the proposed rulemaking under § 245.436(e)(2).

One commentator felt that the requirement to train a new Class A or Class B operator within 30 days for replacing a trained operator should be waived if the company has other trained operators already available to designate. The Board believes that the proposed rulemaking already allows for substitution of trained operators and no waiver is required. When designating any operator who is not yet trained, that operator must be trained within the timeframes stated in the regulation.

Finally, one commentator indicated that the corporate owner of multiple UST facilities is developing in-house training programs to fulfill the requirements to train and certify their own Class A and Class B operators under § 245.141. The Board agrees that the proposed rulemaking, coupled with existing training approval provisions in § 245.141, does not preclude an owner from developing in-house operator training courses and submitting the course outlines for approval by the Department for training the owner’s operators. The regulations require that the course instructor have professional background and knowledge necessary for the technical material covered and that the training course meet regulatory requirements, including testing and certification of the operators.

F. Benefits, Costs and Compliance

Benefits

The amendments are expected to result in significant improvements in the routine operation, maintenance and monitoring of underground storage tanks. This will help to further reduce the number of releases from underground storage tanks and in turn protect public health and the environment. These regulatory changes will provide economic opportunities for third-party trainers. By recognizing a wide array of training options, it is expected that costs to storage tank owners and operators will be minimized.

By establishing a viable operator training program, Pennsylvania will retain underground storage tank state program approval and will remain eligible for continued substantial federal funding for the program under Subtitle I.

Compliance Costs

There are approximately 3,500 tank owners and their operators with nearly 8,700 underground storage tank facilities regulated by the Department in the Commonwealth. More than half of the owners are major corporations, while the remaining owners are mostly small businesses and various government entities. Many of the small businesses and corporations belong to organizations and associations that have shown an interest in helping with the required training for operators. The number of operators at any particular facility range from one to several, depending on the size of the facility and hours of operation. Generally, retail sales facilities have more operators than government entities or non-retail facilities.

The current national availability of underground storage tank training vendors for operators is somewhat limited, but is expected to expand significantly as all states implement mandatory operator training requirements. Many states have indicated that they will rely on third-party or industry trainers. The current cost of national training vendors ranges from \$145 to \$500 per training course for Class A and Class B operators. However, several organizations and associations in Pennsylvania, as well as Department-certified tank installers, inspectors and companies have indicated an interest in becoming approved trainers or in some cases providing services as qualified operators. It is anticipated with in-state and national trainers expanding into the underground storage tank program that the cost of operator training courses will be minimized through these market forces.

The costs for training Class C operators should be very minimal. The Class C operators only require in-house training on emergency procedures and written instructions. Tank owners should already provide this training to satisfy U.S. Occupational Safety and Health Administration requirements in 29 CFR Part 1910 (relating to Occupational Safety and Health Standards); and Pennsylvania Department of Labor and Industry requirements in 37 Pa. Code Chapter 13.

Compliance Assistance Plan

It is not anticipated that the Commonwealth will provide sources of financial assistance to aid in compliance with the final-form rulemaking.

As for technical and educational assistance, the Department currently operates a fairly extensive program of outreach activities designed to assist owners and operators of storage tanks as well as individuals. This program includes a series of fact sheets that focus on single issues in the storage tank program (for example, Leak Detection: Meeting the Requirements); periodic seminars and conferences focusing on storage tank technical and administrative issues; training sessions presented by regional and central office training teams on a variety of issues; numerous guidance documents addressing technical and policy issues; and a great deal of information available on the Department's website. The Department will work with organizations, associations, companies and individuals to establish a base of industry trainers to provide the necessary training, testing and related documentation for owners and operators of underground storage tanks.

Paperwork Requirements

There are very few new paperwork requirements in this rulemaking and no new reporting requirements. The rulemaking addresses requirements to maintain a list of designated operators, certificates or documentation of training, and facility contacts and written emergency procedures. The list of operators, training records and some contact information is new; emergency procedures should already be available at most facilities. These records will be checked during the periodic inspections currently required at underground storage tank facilities and will not be routinely required to be submitted to the Department.

G. Pollution Prevention

The programs set out in this rulemaking package and in the current regulations are designed to prevent the release and spread of regulated substances from storage tanks located in this Commonwealth. They create a program similar to the cradle-to-grave process with the goal of making sure that the storage tank is installed, maintained, operated, closed and removed in a manner that will minimize the likelihood of a release occurring. If a release does occur, these amendments and regulations that currently exist in Chapter 245 are designed to detect and contain the release quickly, and make sure that corrective action is carried out expeditiously, minimizing exposure to the public and the environment.

In this rulemaking, the Department is attempting to reach or improve upon these goals through a combination of performance standards and training of storage tank operators. The final-form rulemaking has built-in flexibility as to how the regulated community achieves the goals and reliance on industry standards and trained industry professionals. By taking this approach, the Department hopes to improve routine storage tank operation and maintenance, reduce pollution, lower the number of corrective actions that must eventually be performed, decrease the amount of contaminated soil and groundwater that must be dealt with, and do so in a manner that is flexible, reasonable and cost effective.

H. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 27, 2009, the Department submitted a copy of the notice of proposed rulemaking, published at 39 Pa.B. 1300 (March 14, 2009) to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees (Committees) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j2)), on (date) , this final-form rulemaking was deemed approved by the Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on (date) , and approved the final-form rulemaking.

J. Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968, P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 39 Pa.B. 1300 (March 14, 2009).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 Pa. Code, Chapter 245, is amended by amending §§ 245.422(e) and 245.435(b); and by adding § 245.436, to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

- (b) The Chairman of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairman shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairman of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

John Hanger
Chairperson
Environmental Quality Board