Comment/Response Document

FINAL RULEMAKING

CHAPTER 245

ADMINISTRATION OF THE STORAGE TANK AND SPILL PREVENTION PROGRAM

Re: Proposed Rulemaking: Storage Tank Program Amendment Proposed Regulation - (7-395)

This is a list of corporations, organizations and interested individuals from whom the Environmental Quality Board has received comments regarding the above referenced regulation.

ID	Name and Address	Zip	Submitted 1 pg Summary	Provided Testimony	Req Final Rulemaking
1.	Lysa J. Holland The Pennsylvania State University University Park, PA	16802			
2.	John M. Arnold, Chairman Petroleum Products Inc. Harrisburg, PA	17105			
3.	Dell M. Cromie, President Glassmere Fuel Service, Inc. Tarentum, PA	15084			
4.	W. Darko Puz PENRECO Karns City, PA	16041	X		
5.	Edward S. Kubinsky, Jr. Crompco Corporation Plymouth Meeting, PA	19462			
6.	Mark Onesky Exton, PA	19341			
7.	Gregory E. Dubas, President Pine Run Construction Doylestown, PA	18901			
8.	Pamela F. Faggert, VP and CEO Dominion Glen Allen, VA	23060			
9.	Joe Caldwell Caldwell Systems Longmont, CO	80501			
10.	Walter E. Rimmer, Executive Director Tank Installers of Pennsylvania State Association Dover, PA	17315	X		
11	Preston M. Beckman, Special Funds Counsel Insurance Department Capitol Associates Building Harrisburg, PA	17102			
12.	Rolf W. Hanson Associated Petroleum Industries of Pennsylvania Harrisburg, PA	17108			
13.	John D. Wanner, CAE, Exec. Dir. Pennsylvania Society of Professional Engineers Harrisburg, PA	17102			
14.	Stephen L. Sherk American Refining Group, Inc Bradford, PA	16701			
15.	Frank Skomorucha Reliant Energy Birdsboro, PA	19508			
16.	Sharon Roth PA Chamber of Business and Industry				

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ID	Name and Address	Zip	Submitted 1 pg Summary	Provided Testimony	Req Final Rulemaking
17.	Pam Witmer, President Pennsylvania Chemical Industry Council Harrisburg, PA	17101			
18.	John V. Kulik, Exec. Vice Pres. PPMCSA				
19.	Karen Reese FirstEnergy Corp. Akron, OH	44308			X
20.	Jennifer Celeste Sunoco, Inc. Philadelphia, PA	19103-7583	X		
21.	Independent Regulatory Review Commission Harrisburg, PA	17101			

COMMENT AND RESPONSE DOCUMENT

General Comments

1. **Comment:** I support the proposed regulation changes to Chapter 245. These regulations are in general more protective of the environment and as such, are needed. (1)

   Response: The Department acknowledges and appreciates the commentator's support for the proposed rulemaking.

2. **Comment:** We support the DEP's objective to offer clarity to the administration of the storage tank and spill prevention program. In particular, we support: 1) the new tank registration provisions in Subchapter A, 2) changes to the general certification requirements in Subchapter B, and 3) the requirements for total secondary containment for underground storage tanks (USTs) in Subchapter E. (10)

   Response: The Department acknowledges and appreciates the commentator's support for the proposed rulemaking.

3. **Comment:** The proposed regulatory changes have been written with the intent to have a positive impact in Pennsylvania. In order to properly assess these changes and allow for public input (primarily from the Storage Tank Advisory Committee (STAC)), the Department should provide the STAC and Environmental Quality Board with a written report within six or seven years of the promulgation of these regulations. The report should quantify how these amendments – specifically, the increased frequency of UST inspections, the expanded definition of "regulated substances" and the correction to re-regulate large aboveground storage tanks (ASTs) storing heating oil for consumption on the premises where stored – meet that basic goal. (15)

   Response: The Department regularly discusses issues concerning program effectiveness with the STAC and will continue to do so in the future. In addition, we provide regular reports to the United States Environmental Protection Agency Region III (EPA), in accordance with our grant agreements and program authorization approval. These discussions will continue, and the specific items listed in the comment will certainly be a part of that ongoing dialogue.

4. **Comment:** The Department and the regulated community would be best served by delaying this rulemaking until all prescribed and final guidelines are issued by the EPA to implement the provisions of the Federal Energy Policy Act of 2005. This would avoid an interim and potentially conflicting rulemaking and should only result in a short-term delay. (12)

   Response: The Department appreciates the commentator's concerns that Pennsylvania's UST program be no less stringent than EPA's in light of the passage of the Energy Policy Act of 2005. We do not agree with delaying this rulemaking until EPA issues final guidelines under the Energy Policy Act, however. First, the process that led to this rulemaking began in 2002, based on the Department's experience in administering the Storage Tank and Spill Prevention Act (Storage Tank Act), as well as the U.S. General Accounting Office's 2001 report reviewing the national UST program. We believe it is in Pennsylvania's best interest to have a storage tank program that addresses the specific

issues facing the Commonwealth, while meeting the letter and spirit of the Storage Tank Act.

Second, the Energy Policy Act is fairly clear on its face and we feel that the final-form rulemaking addresses almost every issue raised in that legislation. It is our belief that EPA will have no problem approving Pennsylvania's UST program as meeting the requirements of 40 CFR Part 281 after the rulemaking is in effect, even in light of the federal statutory changes. Third, the Energy Policy Act only addresses USTs, and so does not affect significant areas addressed in the rulemaking – ASTs, certification, permitting and registration, to name several. Fourth, some Energy Policy Act grant guidelines are not required to be in place as final until August 2007, and EPA has missed important deadlines before the Energy Policy Act. This is not simply a "short-term delay", and allowing Pennsylvania's rulemaking process to be held hostage to EPA's schedules does not seem appropriate. Finally, it might make some sense to wait if EPA was actually proposing to amend the UST regulations at 40 CFR Parts 280 and 281, but instead EPA is only issuing "grant guidelines." These are only policy documents, and only impact federal funding of the state UST programs, rather than binding the regulated community. This means that EPA should have flexibility and discretion to approve continued and expanded funding for Pennsylvania, even where the exact program requirements are not identical (compare, e.g., 40 CFR 280.50 (relating to reporting of suspected releases) and 25 Pa.Code §§ 245.304 (relating to investigation of suspected releases) and 245.305 (relating to reporting releases)).

5. **Comment:** The passage of federal legislation last year significantly changed the requirements of states in regard to UST regulation. This development has led us to respectfully ask that implementation of new state UST regulations be delayed until further guidance is received from the EPA. At that point, a more complete picture will emerge in terms of how to construct the state program going forward. (18)

   Response: The Department does not agree with the commentator that the rulemaking should be delayed until further guidance is received from the EPA. See response to Comment 4.

6. **Comment:** The Department should consider providing a period of six (6) months from the time the regulations are adopted to the time when they are effective to allow time for affected parties to set up policies and procedures to comply with the new regulations. These regulations, as proposed, require significant changes to standards for new equipment that is currently being designed and installed. A six-month phase-in will allow for changes in design and equipment without holding up current capital improvement projects. (20)

   Response: The Department does not agree that a regulation-wide phase-in period should be provided. Where phase-in periods are appropriate, they are narrowly focused and included as a part of the rulemaking in the specific area where they are needed (see, e.g., sections 245.403(c) and 245.505). Also, the Department believes that the long development period noted above, combined with the ongoing regulatory review process, should suffice to give the regulated community adequate notice of the requirements of the rulemaking to allow for planning and design.

7. **Comment:** Several sections of this proposed rulemaking add a phrase identical or similar to the following, "...unless otherwise agreed upon by the Department." This language appears in the following sections:

- § 245.41(b)
- § 245.41(d)
- § 245.41(e)
- § 245.41(f)(4)
- § 245.111(g)
- § 245.411(b)(2)
- § 245.421(a)(2)
- § 245.451(h)
- § 245.561(3)

This is non-regulatory language that should be deleted from the final-form rulemaking. In the alternative, language could be inserted that explains the process that the Department will follow and the criteria the Department will use to allow at exemption. (21)

Response: The Department acknowledges the commentator's concerns and has eliminated the language where it was unnecessary. In sections where the language is retained, the Department added explanatory language to clarify when a requirement may be waived or altered through Department agreement.

8. **Comment:** The phrase, "include, but not limited to" appears as new text in the following sections of the proposed rulemaking:

- § 245.41(f)
- § 245.43(b)
- § 245.432(c)
- § 245.435(b)(1)(i)
- § 245.612(d)
- § 245.616(c)

The phrase "but not limited to" is unnecessary and should be deleted. (21)

Response: The Department has deleted "but not limited to," with the understanding that in each case the list is intended to be inclusive rather than exclusive, and that items of a similar nature are also indicated, even if not explicitly listed (see, e.g., sections 245.108 and 245.109.)

9. **Comment:** Phrases such as "engineering practices, "engineering specification" and "engineering criteria" are included in the following sections:

- § 245.234(a)(3)
- § 245.522(a)
- § 245.522(d)
- § 245.522(f)
- § 245.524(d)
- § 245.552(a)
- § 245.552(e)
- § 245.553(a)
- § 245.553(f)
- § 245.616(a)

Those phrases are vague and would be difficult for the regulated community to know exactly what is expected of them. It would also be difficult for the Department to enforce provisions that include this language. These phrases should be defined or replaced with terms that are more definitive. (21)

Response: The Department believes that these engineering phrases are well understood by the regulated community and necessary to apply many of the Nationally recognized industry standards, typically ACI, API, ANSI, PEI and NACE. Engineering specifications, practices and design criteria are commonly used for AST construction and modification projects. References have been added in the inspection provisions to indicate the technical standards sections where there may be applicable engineering requirements that should be considered during inspection of the tank system.

10. **Comment:** The phrases "scientific or statistical method and procedure" and "scientific or statistical procedure," used in sections 245.543(d) and 245.553(c) respectively, are vague and would be difficult for the regulated community to know exactly what is expected of them. It would also be difficult for the Department to enforce provisions that include this language. Those phrases should be defined or deleted. (21)

Response: These sections of the final-form rulemaking have been amended to address specific testing methods and procedures with references to the National industry standards that apply to these nondestructive testing and examination activities conducted during inspection of the tank systems.

§ 245.1. Definitions.

"Aboveground storage tank" and "Underground storage tank"

11. **Comment:** The phrase "used, will be used" is being added to the existing definition of "aboveground storage tank" and the phrase "were used or will be used" is being added to the definition of "underground storage tank." The statutory definition of "aboveground storage tank" only references a tank "which is or was used," and the statutory definition of "underground storage tank" only references tanks "which are used." The EQB should explain its statutory authority to regulate tanks that are not yet in use. In the alternative, the proposed language should be deleted from the Final-form regulation. (21)

Response: While acknowledging the commentator's concerns, the Department does not agree with the conclusions of the commentator and will retain the proposed rulemaking language in the final-form rulemaking. The proposed rulemaking language properly captures the intent of the Storage Tank Act to regulate tanks from the beginning of installation through proper closure, including site assessment and corrective action, if necessary.

If the commentator's reading of the Storage Tank Act were correct, then certain requirements of the Act would be rendered mere surplusage. First, under this reading, no tank would ever be regulated until a regulated substance was actually added to the tank (i.e., "used to contain an accumulation of regulated substances"). Examples of specific provisions of the Storage Tank Act that would be rendered invalid under such a reading include section 108, which established an interim program for installers of storage tanks; sections 301(c)(2) and 501(c)(2), which state that storage tanks shall only be installed by a certified installer; section 302(b), which established interim AST installation standards; section 301(a)(8), which required the Department to develop a regulatory program establishing "minimum standards for the construction, testing, corrosion protection,

operation, release prevention and repair and reuse of aboveground storage tanks," and section 501(a)(7), which required the Department to develop a regulatory program to include "standards for installation of new underground storage tanks, including minimum standards for the construction, testing, corrosion protection, operation, release prevention and repair and reuse of underground storage tanks."

In addition, adding the phrase "were used" to the definition of "underground storage tank" is appropriate because the obligations of a tank owner and operator do not end merely because the tank no longer contains an accumulation of regulated substances. For example, section 501(a) requires the Department to develop and implement a regulatory program that requires the following, all of which likely occur *after* all regulated substances are removed from a tank:

> (5) Corrective actions by owners, operators, landowners and occupiers, or other responsible parties, on an emergency basis if necessary, in response to a release from an underground storage tank.
>
> (6) Requirements for closure of tanks by owners and operators to prevent future releases of regulated substances into the environment.
>
> * * * * *
>
> (8) Standards and procedures for . . . removal of tanks and intended and completed closure of an underground storage tank.
>
> (9) Methods and procedures for the removal of underground storage tanks from service by the owner or operator.
>
> * * * * *
>
> (13) Minimization of the amount of soil and subsurface material affected by a release of a regulated substance by segregating the unaffected soil and subsurface material during removal of an underground storage tank from the material affected by a release of a regulated substance.

Section 501(c)(2) of the Storage Tank Act provides that USTs shall only be removed by a certified installer, another activity that takes place only after all regulated substances are removed from the UST. Section 502(c) is even more explicit concerning regulation of USTs that "were used" to contain an accumulation of regulated substances, stating:

> (c) Discontinued use.--Upon abandonment or discontinuance of the use or active operation of an underground storage tank, the owner and operator shall remove the tank and its contents or shall seal the tank, and restore the area in a manner that prevents any future release, and shall remedy any adverse impacts from any prior release in a manner deemed satisfactory to the department.

The definition of "owner" in section 103 of the Storage Tank Act also supports the additional language in the definition of "underground storage tank." That definition includes:

> (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.

(emphasis added).

The Department does not believe that it was the Legislature's intent to invalidate these portions of the program through these definitions, and the additional language merely clarifies the Department's understanding of the proper scope of the Storage Tank Act.

"Air Pollution Control Act"

12. **Comment:** The title of the act referenced is incorrect. The correct reference is the "Uniform Interstate Air Pollution Agreements Act." (21)

    Response: The title referenced in the proposed rulemaking is correct; the citation was incorrect due to a typographical error. The citation has been corrected in the final-form rulemaking.

"Consumptive use"

13. **Comment:** We agree that very large ASTs storing heating oil for consumption on the premises pose a substantial risk and should be regulated. However, these tanks are currently regulated under 40 CFR 112.8(c) (relating to Spill Prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities); Bulk storage containers). The proposed amendment to the definition of consumptive use to exclude tanks over 30,000 gallons adds no additional benefit and is unnecessary to adequately protect human health and the environment. Therefore, the proposed change in the definition should be deleted to avoid dual regulation. In addition, the 30,000-gallon capacity for inclusion in the definition of consumptive use is arbitrary and capricious. If the proposed change to the definition is not deleted it should at a minimum be revised to include ASTs of 50,000 gallons or less capacity. (19)

    Response: The Department agrees with the commentator that this class of ASTs poses risks and should be regulated. Further, we believe that regulation of these ASTs is consistent with the original intent behind the Storage Tank Act, and they should therefore be regulated under that Act. That is true regardless of the existence of a federal program that also regulates these tanks; the Pennsylvania regulatory program contains many items missing from the federal Oil Pollution Act. A critical argument in favor of independent Storage Tank Act regulation from the Department's perspective is the ability to respond to releases from such tanks under the Storage Tank Act authority, rather than waiting for federal action that may not be forthcoming.

As for the size cutoff, the Department does not agree that the proposed definition is "arbitrary and capricious." The "30,000 gallons capacity" cutoff is valid because that size AST is generally the largest size AST possible to be manufactured, as that term is used in section 245.1 (see, e.g., definition of "aboveground manufactured metallic storage tank"). Thus, any AST regulated by this amendment will require some level of fabrication and assembly at the tank facility. "Field-constructed" tanks are safe and effective when properly installed, but such proper installation requires specialized expertise to accomplish and so it is particularly important to regulate those ASTs with over 30,000 gallons capacity.

"Pipeline facilities (including gathering lines)"

14. **Comment:** The proposed change should not be adopted as written. It appears to move the regulations beyond the authority established in the Storage Tank Act. This change appears to regulate ASTs regulated under the Hazardous Liquids Pipeline Safety Act under the Storage Tank Act as well. Such tanks are specifically excluded by the Storage Tank Act. (15)

    Response: The Department believes that this change merely codifies the existing program, at both the federal and state levels, concerning ASTs used for both pipeline and other purposes. Minor changes were made to the final-form rulemaking to help further clarify this definitional term.

15. **Comment:** The amended definition is one sentence that contains over 125 words. It includes a list of equipment that may be regulated and a list of equipment that is not regulated. To improve clarity, we suggest that the definition be broken into subsections. (21)

    Response: The Department acknowledges the commentator's concerns and has amended the definition for clarity in the final-form rulemaking.

"Regulated substance"

16. **Comment:** The proposal expands the definition of "regulated substance" in several ways, including in paragraph (i)(C)(III) by adding substances included on a list maintained by the Department of Labor and Industry at 34 Pa. Code Chapter 323 (relating to hazardous substance list). This proposal is too broad and steps should be taken to ensure that the regulated community and the public know which specific substances are included in the definition. Additional substances added to the definition of "regulated substance" under this paragraph should be selected individually and specifically listed in the definition, or at least shown in the same way the nonpetroleum oils proposals are shown. (10, 16, 17, 19, 20)

    Response: After further review of the Chapter 323 hazardous substances list, the Department removed this proposed amendment from the final-form rulemaking. The number of substances on the Labor and Industry list, but not already on the CERCLA list, is fairly limited. Further, at this time, the Department does not have specific information concerning the number or size of storage tanks containing those limited substances. Therefore, this amendment has been removed from the final-form rulemaking.

17. **Comment:** Several commentators expressed concerns regarding the incorporation by reference of the Chapter 323 list of environmental hazards for process reasons. Chapter 323 is not intended as a method of regulating materials found in storage tanks. It was drafted as a method for facilities to inform employees about hazardous substances found at the workplace. By adopting this list by reference, DEP is effectively removing the ability to make any additions or subtractions. The only way this list could be changed was through a regulatory change initiated by the Department of Labor and Industry, and considering that the function of this list is not for environmental purposes, DEP's concerns will not be considered highest priority when it is amended. In addition, the relative obscurity and age of this list will prove to be difficult for tank owners to find. The reference to 34 PA Code Chapter 323 should therefore be removed and any list of newly regulated substances published in full in the regulations to make the reporting requirements more transparent and to make the list amendable by DEP. This code is outside the Department's jurisdiction, and future amendments can be made to Chapter 323 without going through the environmental review and comment process. (15, 17, 21) By incorporating the substances on the Chapter 323 list that are defined as "environmental hazards," the EQB would effectively relinquish control over this portion of the regulation to the detriment of both the EQB and the regulated community. Pursuant to Act 275 of 1970, Section 1920-A of the Administrative Code of 1929, 71 P.S. § 510-20, the EQB was established to formulate, adopt and promulgate rules and regulations necessary for the proper work of the Department. Chapter 323, however, is promulgated by the Department of Labor and Industry, which may modify the list without EQB consent. Therefore, the regulated substances under Chapter 323 should be directly listed in Chapter 245, rather than incorporated by reference to ensure continued and active oversight by the EQB. (16)

Response: See response to Comment 16. The Department does not agree that incorporating by reference regulations outside the control of the EQB is somehow illegitimate or illegal under the Commonwealth's laws governing incorporation by reference. For example, in this very definition the list of hazardous substances maintained by EPA under CERCLA is incorporated by reference ((i)(A)); section 245.2 incorporates by reference 40 CFR Part 280, Subpart I (relating to lender liability); several sections reference standards established by the U.S. Occupational Safety and Health Administration (OSHA); in several places the regulations reference the requirements of the Engineer, Land Surveyor and Geologist Registration Law; and applicable industry codes and standards, as well as manufacturer's specifications, are incorporated by reference throughout subchapters E, F, and G. Any or all of those requirements could change without action by the EQB, and the Department does not believe that the EQB is effectively relinquishing control over these portions of the regulation "to the detriment of both the EQB and the regulated community."

Incorporation by reference is a critical tool for many of the complex and detailed programs administered by the Department. The test for proper incorporation by reference is whether or not the particular information incorporated will be useful in meeting the goals and requirements of the program in question. If an incorporated standard or document does prove problematic, the straightforward solution is to amend the incorporating regulation to delete that reference.

18. **Comment:** The one-pound release reporting requirement contained in (i)(C)(III) appears arbitrary and will be needlessly expensive. Please explain the technical justification for this requirement or provide a cost/benefit analysis. (16, 20, 21) The 1-pound reportable quantity is both arbitrary and unmanageable. This requirement under the definition of regulated substance in Section 245.1 regulates many chemicals that are readily found around the typical home. By assigning a minimum requirement, DEP is effectively regulating all containers of driveway sealant, linseed oil and vinegar with quantities over one pound. This definition should be reconsidered to a much larger quantity that would be more commonly held by facilities that employ storage tanks. (17)

    Response: See response to Comment 16. Although this provision is deleted from the final-form rulemaking, the Department notes that the one-pound reporting requirement matches the "default" requirements under section 102(b) of CERCLA (42 U.S.C.A. § 9602(b)). Further, this is a "release reporting" requirement, not a regulatory threshold – no containers under 110 gallons capacity (USTs) or 250 gallons capacity (ASTs) are regulated under the Storage Tank Act.

19. **Comment:** If the EQB finds technical or scientific justification to add the environmental hazard substances on the Chapter 323 list to the definition, only storage of such substances in USTs or large ASTs should be regulated (16, 20). If the EQB chooses to keep the substances listed as environmental hazards in Chapter 323 in this definition, then it should also keep the temporary exclusion and phase-in period for any newly-regulated tanks provided for in sections 245.403, 245.505 and 245.605. (16)

    Response: See response to Comment 16.

20. **Comment:** Regulated substances should only include materials that are liquids at standard conditions of temperature and pressure (60 degrees F and 14.7 pounds per square inch absolute). The term "gaseous" substances in the regulated substance definitions "(i)(A)" and "(i)(C)(III)" should be deleted from the definition since these types of materials are not stored in typical atmospheric storage tanks but are stored in pressurized vessels or tanks. (20)

    Response: The program currently regulates a number of gaseous hazardous substances, which are stored in low-pressure storage tanks that do not qualify as pressure vessels. In addition, under the Storage Tank Act the "standard temperature and pressure" concept is only a factor for petroleum substances and does not apply to hazardous substances.

21. **Comment:** Subsections (i)(C)(I), (II) and (III) of the definition include substantive provisions. Specifically, each of the subsections includes provisions that specify when a substance would be regulated or not regulated. Since substantive provisions in a definition are not enforceable, they should be deleted from the definitions and moved to more appropriate sections in the body of the regulation. (21)

    Response: The Department does not agree with the commentator that the proposed changes are substantive in nature – rather, they are definitional in that they define in which class of "regulated substance" certain compounds will be included (i.e., either hazardous substances or petroleum). The final-form rulemaking has been amended to reflect treating

newly regulated substances in (i)(C)(I) (non-petroleum oils) and (II) (pure ethanol) the same as petroleum in (i)(B) of the definition of "regulated substance." The actual substantive requirements are found later in Chapter 245, where the definitional distinction directs regulated entities to the proper requirements for their tank (see, e.g., section 245.443 (relating to requirements for hazardous substance underground storage tank systems)). The General Assembly already addressed conditional differences between petroleum and hazardous substances in the definition of "regulated substance" in section 103 of the Storage Tank Act (35 P.S. § 6021.103).

§ 245.31. Underground storage tank tightness testing requirements.

22. **Comment:** The requirement in subsection (e) to provide written tightness test results to the owner within 20 days is too stringent. Twenty days is not enough time to turn a report around and have it in the hands of the UST owner, given the process such a report must go through (quality control, invoicing and submittal). Instead, a 30-day submittal would be in order. There is no harm to the public if this change was made, as the UTT tester must notify the Department within 24 hours if the tightness test result is a failure. (5, 21)

Response: The Department does not agree that the 20-day report requirement is too stringent. The 20-day written report to tank owner requirement is similar to the current reporting requirement for SIR tank release detection requirement, which the Department coordinated with EPA and compared with other states' reporting requirements.

§ 245.41. Tank registration requirements.

23. **Comment:** Since all USTs and ASTs put into temporary closure will no longer be in operating status, this section should be amended to address Department withdrawal of the out-of-service tank's operating permit. (2, 10)

Response: The Department agrees, and this section has been amended in the final-form rulemaking to include routine withdrawal of the operating permit when a tank is reported in temporary closure or temporary out-of-service status.

24. **Comment:** The requirements in subsection (f)(4) should specifically exclude routine switching of petroleum products that are very similar in composition but have different specific product names. For example, products such as kerosene and diesel fuels are very similar products and storage tanks can be switched back and forth between these products depending on inventories and supply demands. Without the specific exclusion, the requirements for notification are too restrictive and will cause excessive and frequent notification requirements for minor changes in tank products. Notification of changes in substances stored should only apply when there is a significant change, such as a change from a petroleum product to a hazardous substance, and not when a change is only in the type of petroleum product (e.g., from diesel to kerosene). (20)

Response: The Department recognizes that some operations change substances frequently because of business practices and included the ability to address this issue in the final-form rulemaking. The substance in a tank is important, however, as the substance stored

determines technical regulatory requirements and Underground Storage Tank Indemnification Fund billing.

25. **Comment:** Subsection (b) requires tank owners to register storage tanks with the Department "**except as specifically excluded by Department policy** or this chapter," (Emphasis added.) A Department policy does not have the full force and effect of law. Therefore, Departmental policy cannot exclude a tank that regulations require to be registered. The language noted above should be deleted and the specific exclusions should be included in the final-form regulation. (21)

Response: The Department acknowledges that generally Department policy does not have the full force and effect of law. In the exception that proves the rule, however, it appears that the General Assembly did grant the Department the power referenced in the comment in sections 303 and 503 of the Storage Tank Act (35 P.S. §§ 6021.303 and 6021.503):

Section 303. Registration.

(a) Registration requirements.--Every owner of an aboveground storage tank, ***except as specifically excluded by policy or regulation of the department,*** shall register each aboveground storage tank by completing and submitting the form provided by the department and by paying the yearly registration fee prescribed by the department for each aboveground storage tank. It shall be unlawful for any owner or operator to operate or use, in any way, any aboveground storage tank that has not been currently registered as required by this section.

* * * * *

Section 503. Registration.

(a) Requirements.--Every owner of an underground storage tank, ***except as specifically excluded by policy or regulation of the department,*** shall register with the department each underground storage tank by completing and submitting the form provided by the department and by paying the registration fee prescribed by the department for each underground storage tank within three months of the effective date of this act. Volunteer fire companies and volunteer emergency medical services organizations which own underground storage tanks shall register each underground storage tank with the department but shall not be required to pay the registration fee. It shall be unlawful for any owner or operator to operate or use, in any way, any underground storage tank that has not been registered as required by this section.

(emphasis added). Therefore, the definition is not changed in the final-form rulemaking.

§ 245.42. Tank registration fees.

26. **Comment:** Since all USTs and ASTs put into temporary closure will no longer be in operating status, this section should be amended to address Department withdrawal of the out-of-service tank's operating permit. (2)

Response: Only permanent closure or change in service to unregulated use affects the tank registration fee. Section 245.41 has been amended in the final-form rulemaking to include routine withdrawal of the operating permit when a tank is reported in temporary closure or temporary out-of-service status. See response to Comment 23.

§ 245.43. Failure to pay registration fee.

27. **Comment:** Subsection (a) states that an owner who fails to pay the registration fee shall be subject to "Commonwealth policy and guidelines" for collection of delinquent debts due the Commonwealth. We have two questions. What is the EQB's statutory authority for enforcing policies and guidelines as regulations? Where can the regulated community find these guidelines and policies? If the EQB does not have the statutory authority, the pertinent provisions of the policies and guidelines should be included in the final-form rulemaking. (21)

Response: To a large degree, this language is included here merely to put the regulated community on notice of the consequences of failure to pay this fee (see, e.g., 25 Pa.Code § 245.212(b)); therefore, the "shall" in this section has been changed to "may". The Department notes, however, that there is a Management Directive, 310.10, relating to Collection, Requests for Compromise, and Write-Off of Delinquent Claims, that directly establishes an applicable process. In some cases, Pennsylvania appellate courts have held that Management Directives are binding on state employees in a similar manner to regulations' binding effect on the regulated community. See, e.g., Cutler v. State Civil Service Commission (Office of Administration), 2006 Pa.Commw. LEXIS 500; Mirarchi v. Commonwealth, Department of Corrections, 811 A.2d 1096 (Pa.Commw. 2002). The Department's Storage Tank Program follows Management Directive 310.10 when collecting delinquent registration fees, along with exercising other enforcement options (e.g., civil penalties, administrative orders, withholding or revoking permits, etc.). In addition, any enforcement policy of the Department undergoes public notice and comment, along with review by the Storage Tank Advisory Committee, and is available from the Department directly or on the DEP Web Site.

28. **Comment**: Subsection (b) states that failure to pay the registration fee could result in Departmental action against the storage tank *owner and the operator*. Sections 245.42 (a) and (b), relating to tank registration fees, state that registration fees are to be paid by tank owners. Therefore, the reference to tank operators should be deleted from this subsection. (21)

Response: The Department acknowledges that the Storage Tank Act places the responsibility to pay annual registration fees on the owner of the aboveground (35 P.S. § 6021.303(a)) or underground (35 P.S. § 6021.503(a)) storage tank. Those same subsections contain language that states:

> It shall be unlawful for any owner or operator to operate or use, in any way, any [aboveground or underground] storage tank that has not been currently registered as required by this section.

Therefore, although the obligation to register the regulated storage tank rests with the tank owner, operation of a regulated storage tank that is not properly registered is also a violation of the Storage Tank Act. The intention of this section was to put the operator on notice of this requirement, and of the potential liability for operating a regulated storage tank for which annual registration fees have not been paid.

29. **Comment:** Subsection (c) states that the Department may withhold an operating permit for a tank if the owner has a delinquent registration debt for any regulated storage tank. Under what circumstances would the Department withhold a permit? (21)

Response: Failure to pay required registration fees is a violation of either section 303(a) (aboveground) or 503(a) (underground) of the Storage Tank Act. Section 1301 of the Storage Tank Act establishes the criteria upon which the Department may withhold or revoke a permit under the Act. (35 P.S. § 6021.1301).

§ 245.110. Certification of installers.

30. **Comment:** If the proposed amendment to section 245.110 is approved, the data received by the Underground Storage Tank Indemnification Fund (USTIF) from the Department will not differentiate between USTs and ASTs. This will make it very difficult, if not impossible, to properly and accurately bill fees for the Tank Installers Indemnification Program (TIIP), particularly with regard to new companies or companies that previously had only worked on ASTs but now want to work on USTs as well. This may adversely impact TIIP because it will not be able to properly and accurately bill the UST installer community. (11)

Response: The Department acknowledges the commentator's concerns and has retained the existing, separate categories for underground and aboveground tank installers in the final-form rulemaking.

31. **Comment:** Subchapter B should be expanded to include a new category for AST installer certification. This new category would be known as AST-UL and allow for installations, minor modifications and removals of ASTs built to strict Underwriter's Laboratory (UL) standards. These UL tanks are built to store and dispense only combustible and flammable motor fuels and rarely reach a maximum capacity of 50,000 gallons capacity. Work on these ASTs is very different from work on field-constructed ASTs and was done mainly by UST installers prior to the passage of the Storage Tank Act. This change would help reflect that reality in the certification program. (10)

Response: The Department does not agree that a new certification category is needed. The current aboveground manufactured storage tank installation, modification and removal categories cover these activities. Individuals with underground tank handling certification categories may apply for aboveground categories without any aboveground storage tank activities. They become certified in aboveground categories on passing the appropriate aboveground examination module. The Department is reviewing the examination module required for the aboveground manufactured storage tank removal category and may create one examination module for aboveground and underground manufactured storage tank removal certification categories.

32. **Comment:** There are several UST activities that should be covered under the UTT certification category. Currently many activities are only allowed to be performed by the UMX category and UTT-certified individuals are qualified to perform these tasks. Such tasks include replacing mechanical line leak detectors, replacing overfill ball float valves and droptubes, functionality testing of line leak detectors, replacement of packer o-rings and functional elements and motors on submersible transfer pumps, stage II vapor recovery testing activities, containment sump, UDC sump and spill bucket tightness testing activities, cathodic protection testing activities and replacement of any tank top components so long as excavation is not necessary for the replacement. (10)

Response: The Department considers tightness testing and tank handling as separate activities and created specific certification categories for each type of activity. Tank handling and tightness testing activities are defined in the regulation. Individuals certified in tightness testing can only modify the tank system as required by the testing method. If an individual performs tightness testing and tank handling activities, he/she must be certified in the appropriate categories based on the type of activity. Individuals may need multiple certification categories for a project.

The definition of a cathodic protection tester is in the regulation. The Department does not see the need to require individuals meeting this definition to be certified unless tank handling activity occurs.

The Department has a technical guidance on Modification and Maintenance Issues, revised October 2005. A properly certified individual must perform activities that are considered modifications. Maintenance activities do not need to be performed by a certified individual. The Storage Tank Program's Fact Sheet 2A, *Understanding the Certification Categories*, helps clarify which activities can be performed under the certification category.

§ 245.113. Certified inspector experience and qualifications.

33. **Comment:** In subsection (a), for the certified inspector categories of IUM and IAM, the certification requirement to demonstrate competence through completing twenty (20) activities should be retained. The proposed changes appear to require no activity experience for inspector certification. Significant field experience is necessary to guarantee inspector competence. (7, 10)

Response: The proposed regulation did not require activities for initial certification of inspectors because the applicant's experience and qualifications include certifications that require activities for issuance of the certifications. IUM certification will require DEP certification in the UMX category and IAM certification requires API or STI inspector certification or DEP-approved aboveground tank inspector certification, which require experience for issuance. Therefore, the proposed language is retained in the final-form rulemaking.

§ 245.114. Renewal and amendment of certification.

34. **Comment:** In subsection (c), for the certification category AMNX, the proposed requirement of twelve (12) installations or major modifications needed for renewal of certification is excessive. Very few non-metallic ASTs are installed or modified today. This requirement should be changed to six (6) installations or major modifications. (7, 10)

    Response: The Department acknowledges the commentator's concern. The number of activities for renewal should be equal to the number of activities required for initial certification. Proposed activity requirements have been adjusted for all categories in the final-form rulemaking. For the AMNX category, the Department has changed the activity requirement from 12 to 9 activities in the final-form rulemaking.

35. **Comment:** We support the transition proposed in this section concerning renewal from qualifications based on activities to qualifications based on training. We believe, however, that more detail is needed in the regulations on what specific training meets these requirements. We believe that there should be a requirement for annual continuing education for certified installers and inspectors. We recommend that the minimum annual education requirement be set at eight (8) hours per year, six (6) of which would come from training offered by the Tank Installers of Pennsylvania State Association. The remaining two (2) hours should be from industry manufacturers demonstrating new product procedures for correct installation and testing of new system components. All installers and inspectors should be held to the highest professional standards and continuing education will help accomplish this goal. (10)

    Response: The Department acknowledges and appreciates the commentator's support for the movement to training when renewing installer certification. The Department has added specific information regarding the training requirements in the final-form rulemaking. See response to Comment 36. However, the Department does not support establishing a specific minimum annual continuing education requirement for installers in the final-form rulemaking. Instead, the Department believes that flexibility will be needed to require training when appropriate. In some instances this might require more than the suggested minimum requirements, and for specific certification categories less training might be acceptable.

36. **Comment:** Subsection (c) requires an applicant to meet "minimum training requirements or number of activities in the appropriate category for renewal of installer certification." The number of activities that need to be completed for renewal is specified, but the number of hours of training is not specified. The final-form regulation should include the number of hours of training needed for renewal. Similarly, subsection (d), relating to renewal of inspector certification, should include the required number of hours of training. (21)

    Response: The proposed technical training for renewal of certification categories is intended to be category-specific. At a minimum, the technical training for renewal covers the technical and regulatory material related to the category and identified in the certification examination Candidate Guide and DEP Study Guides for the examinations. The technical training is not to include either the required safety training or the administrative training presented by the Storage Tank Program. An individual completing the technical training must demonstrate the same competency as an individual passing the category specific examination module. Because the training courses are category specific

and approved by the Department, based on course outline and content, there is no need or desire to assign credit hours for a course or require a specific number of training hours for renewal. Course content is the important factor, not the time spent in training. Clarifying language concerning the difference between technical training requirements for initial and renewal of certification and course expectations has been added to section 245.142 in the final-form rulemaking.

37. **Comment:** Subsection (g)(2) requires an applicant for renewal to "document current safety training which is appropriate for the certification category." We have two questions. First, how will an applicant know if the safety training is appropriate? Second, how much training is required? The final-form regulation should provide criteria for what is appropriate. (21)

    Response: The Department does not develop the criteria for safety training. Safety training requirements are developed by other regulatory agencies, such as the federal OSHA, and industry organizations. Safety requirements for tank handling and inspection activities are specific to the conditions at the site during the activity, which may include multiple certification categories. Certified companies and individuals need to be aware of and follow these safety requirements. The Department is simply requesting the applicant to certify completion of a safety training program that is appropriate for the certification category in question. The final-form rulemaking is amended to clarify what information is required in the certification application.

§ 245.203. General requirements for permits.

38. **Comment:** Since all USTs and ASTs put into temporary closure will no longer be in operating status, this section should be amended to address Department withdrawal of the out-of-service tank's operating permit. (2)

    Response: The Department agrees and we have amended this section in the final-form rulemaking to include routine withdrawal of the operating permit when a tank is reported in temporary closure or temporary out-of-service status. This revision correlates with changes in the final-form rulemaking to section 245.41.

§ 245.222. Application requirements.

39. **Comment:** Since all USTs and ASTs put into temporary closure will no longer be in operating status, this section should be amended to address Department withdrawal of the out-of-service tank's operating permit. (2)

    Response: The Department agrees. The final-form rulemaking changes to sections 245.41 and 245.203 address this issue. See response to Comment 38.

§ 245.231. Scope.

40. **Comment:** An exemption from the site-specific installation permit requirements should be provided when a new large AST replaces an existing tank at the same location. The process should be streamlined since there are several reports required when an old AST is

closed and a new AST is built in the same location – registration forms, closure reports, and the permit application for the new AST's site-specific installation permit (SSIP). These administrative burdens could be eliminated by simply recording/reporting the tank changes on the registration form. (14, 16)

Response: The replacement of an existing storage tank with a new tank is considered a tank closure and installation of a new tank. All statutory and regulatory requirements must be met for these activities. Although the registration form could probably be amended to cover all of the information required as part of an AST closure report (including proper site assessment for releases) and as part of the SSIP (including information about the site), the resulting form would be unwieldy, confusing and difficult to use. Rather than requiring all AST owners to adapt to such a change, the Department will retain the individual reports and forms specifically targeted at the other areas of the AST program. The final-form rulemaking does reduce the required submissions for an AST being constructed on the footprint of a previous AST. The submissions for replacing an AST on the same footprint are greatly reduced in the final-form rulemaking, and allow the Department to quickly address any issues that are discovered during the removal, permitting and installation processes.

§ 245.405. Codes and standards.

41. **Comment:** This new section lists industry standards and codes and requires UST systems to comply with applicable codes. It goes on to state "[r]egulatory requirements prevail over codes and standards whenever there is a conflict." To be fair to the regulated community, the Department should list those conflicts either directly in the regulations or in some publicly accessible manner. (12)

Response: Given the detailed nature of the industry standards and codes applicable to the storage of regulated substances in USTs, it would be administratively difficult to list every instance of conflict. This would also be a shifting target, as generally industry codes and standards are updated or amended more frequently than the Chapter 245 regulations. In many instances, the conflict is in the nature of a mandatory command in the regulations ("owner *shall* do X"), versus a discretionary option in a code or standard ("owner *may* do X"), or a firm deadline for an action established in the regulations versus an open-ended code or standard. Given the highly fact-specific nature of these issues, the Department has retained the proposed language in the final-form rulemaking, and recommends contacting the Storage Tank Program to determine whether or not a conflict truly exists.

42. **Comment:** Subsection (a) lists 12 associations and their codes and standards that will be used in conjunction with manufacturers' specifications to comply with this subchapter. Subsection (b) states, in part, the following: "Other Nationally recognized associations and their codes and standards not referenced in this part may also be used to comply with this subchapter, when appropriate." Pennsylvania Code and Bulletin *Style Manual* discourages the use of indefinite terms and phrases (section 616(b)(6)). "When appropriate" is such a phrase. The purpose of a regulation is to establish binding norms that are enforceable. The provision quoted above does not accomplish this and should be deleted and replaced with specific criteria for when other codes and standards are permissible. (21)

Response: The Department acknowledges the commentator's concern. The final-form rulemaking has been amended to delete "when appropriate" from this subsection and add, "when approved by the Department."

43. **Comment:** Subsection (c) states that if codes, standards or specifications are updated, facilities or storage tank systems installed prior to the updates "will not automatically be required to be upgraded to meet the new standards." The inclusion of the term "automatically" implies that the facilities or storage tank systems may have to be updated in the future. The final-form regulation should include specific details on when the upgrades will be required. (21)

Response: The rationale behind this language is to indicate that the industry standard in effect at the time the activity is done is the industry standard that should be followed. It may be appropriate in certain circumstances (e.g., when there is an imminent threat to public safety) to require tank owners to meet an updated industry standard. Meeting the new requirement could involve a specific facility or it could be an industry-wide change. It is nearly impossible to anticipate every instance in which such upgrades might be necessary. If the Department were to require such upgrades, however, it would do so only via notice to the affected tank owner(s) and we assume that requiring such an upgrade would be considered an "action" of the Department reviewable by the Environmental Hearing Board under the Environmental Hearing Board Act (35 P.S. §§ 7511 – 7516). To clarify this, the Department added language to the final-form rulemaking indicating that existing tanks will not be required to automatically upgrade to a new standard, unless the revised standard or the Department specifies that upgrade is required.

44. **Comment:** The language contained in Subsections (b) and (c) can also be found in existing sections of Chapter 245. Those sections are section 245.504, relating to technical standards for aboveground storage tanks and section 245.604, relating to simplified program for small aboveground storage tanks. If the EQB amends section 245.405(b) and (c), we recommend that sections 245.504 and 245.604 also be amended. (21)

Response: The Department agrees with the commentator and has made the suggested changes to the final-form rulemaking.

45. **Comment:** Subsection (d) states: "Regulatory requirements prevail over codes and standards whenever there is a conflict." This provision is not needed because regulations have the full force and effect of law and already prevail over codes and standards. If the EQB decides to retain this provision, similar language should also be added to sections 245.504 and 245.604. (21)

Response: The Department does not agree with the commentator regarding the necessity of this language. After all, the industry standards are incorporated by reference into the regulations in this section. Absent this language, it is at least arguable that the industry standard would prevail over the conflicting regulatory requirement. To the extent that the commentator suggests adding similar language to other sections, the Department agrees and has made the recommended changes to the final-form rulemaking.

§ 245.411. Inspection frequency.

46. **Comment:** The requirement proposed in subsection (d) to require operator training when related violations are documented through an inspection is a good one, but does not appear to meet the requirements for routine operator training contained in the Federal Energy Policy Act of 2005. The Department should add requirements meeting the Energy Policy Act training requirements to appropriate sections in Subchapter E. (2)

Response: The Department agrees with the commentator. The rulemaking only addresses owner and operator training in the context of verification of violations. The Federal Energy Policy Act of 2005 does contain requirements for additional training for owners and operators whose storage tank systems are determined to be out of compliance. The final-form rulemaking does not, however, address the Energy Policy Act requirements concerning ***routine*** operator training. The Energy Policy Act does not require EPA to develop guidelines for this requirement until August 2007 (42 U.S.C. § 6991i(a)(1)), and EPA has not released draft grant guidelines on this issue for public comment to date. Further, Pennsylvania and other states are not required to have routine operator training requirements in place until August 2009 (42 U.S.C. § 6991i(b)). The Department has retained subsection (d) in the final-form rulemaking, however, to address owner and operator training after verification of violations.

47. **Comment:** The proposal to require training for owners and operators is contingent upon UST program violations documented through inspections. The Federal Energy Policy Act of 2005 requires routine training of three classes of UST owners and operators and is not conditioned on the receipt of a notice of violation. The rulemaking should be amended to comply with the Federal Energy Policy Act requirement. (12)

Response: See response to Comment 46.

48. **Comment:** The tightening of inspection frequency is appropriate and consistent with the Federal Energy Policy Act of 2005. (12)

Response: The Department acknowledges and appreciates the commentator's support for the increased inspection frequency and recognition that it meets the Federal requirements.

49. **Comment:** It is very difficult to track a specific date for future inspection based on the date of UST installation or the last inspection relative to future inspections. It would be more appropriate to state that subsequent inspections be conducted within a three (3) year or thirty-six (36) month period rather than specifically, "commencing after the last inspection." (12)

Response: The Department does not agree with the commentator. It is not difficult to track past and future inspection dates. The tank owner, when submitting the storage tank registration/permitting form, provides the tank installation dates to the Department. Every inspection form received by the Department is logged with the date of inspection in the Department's database. The last inspection date and the next due inspection date are currently being tracked by the Department and printed on the annual registration certificate, which is provided to the owner and posted at the facility. Tank owners should know when

the tanks at their facilities were last inspected and be able to determine from the regulations when the next inspection is due. The time interval between routine inspections may not exceed 3 years, except as noted in the response to Comment 50. In deference to the commentator, the final-form rulemaking has been amended to further clarify the 3-year routine inspection frequency.

50. **Comment:** A temporary exclusion for subsequent facility inspections should be added for currently regulated USTs. Under section 245.411, such tanks currently are allowed to go five or ten years between operations inspections. As a result, these USTs should not be required to be inspected for three years from the previous inspection, or three years from the effective date of these regulations, whichever is later. This will ensure that owners of currently regulated USTs that have not been inspected for more than three years prior to the effective date of the rulemaking will not be out of compliance on the date the rules are published. (15)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to include a phase-in period for routine inspections of tanks that have current inspection due dates greater than 3 years at the time of final adoption of the rulemaking. This phase-in period is consistent with the August 8, 2010, deadline that EPA has established for meeting the 3-year inspection frequency requirements in the Federal Energy Policy Act.

51. **Comment:** While the delayed inspection program outlined in subsection (b)(2) makes sense for new construction, the delay is not appropriate for facilities that have a change in ownership or occupancy. If the facility changes ownership or occupancy, the inspection process should be allowed to take place prior to the first six (6) months of operations to coincide with initial ownership transfer inspections. (20)

Response: The Department requires the inspection of the facility 6 months after a change in ownership to confirm that the new owner is properly operating and maintaining the facility. This was clearly addressed in the "Summary of Regulatory Requirements" published with the proposed rulemaking. The final-form rulemaking does provide flexibility in that the Department may agree to another timeframe. The Department has been and remains flexible on the change of ownership inspection, when the facility owner changes, but facility operator remains the same.

52. **Comment:** Subsection (d) relates to additional inspections and mandatory training. A provision is being added that would allow the Department to require facility owners and operators to complete a release detection or operator maintenance training course when related violations are documented through an inspection. The Preamble explains that this provision is being added because owners and operators that have noncompliant inspections often express the need for training. The final-form regulation should provide details on when this mandatory training will be imposed, what the training will entail and who must pay for the training. (21)

Response: The Department acknowledges the commentator's concerns. The Department is reluctant to include an all-encompassing list of possible training programs because the training program required may be specific to that facility (e.g., training from the

manufacturer on how to use the installed release detection system) or may not yet be developed. The Department anticipates a significant increase in available training nationally as the federal Energy Policy Act's routine training requirements become effective over the next two or three years. The final-form rulemaking has been amended to include examples of the type of training that could be used to satisfy this requirement. Because the Department will typically require the training as part of the enforcement follow-up after the verification of facility violations, the specific course necessary can be addressed at that time. The final-form rulemaking is also amended to note that the tank owner or operator shall incur the cost of the training.

§ 245.421. Performance standards for underground tank systems.

53. **Comment:** I am particularly pleased to see the requirement for automatic pump shutoff when a leak is detected by the line leak detectors that are required for pressurized piping systems. This should cause a significant reduction in releases. (1)

Response: The Department acknowledges and appreciates the commentator's support for the proposed rulemaking, and agrees that the amendments should result in fewer and less extensive releases.

54. **Comment:** The requirement for total secondary containment of all new and replacement USTs is more stringent than the secondary containment requirement included in the Federal Energy Policy Act of 2005, which is limited to USTs located near navigable waters or drinking sources. This will cost Pennsylvania UST owners a great deal of additional money for little environmental benefit. (3)

Response: See responses to Comments 4 and 5. The Department agrees that the total secondary containment regulation is new and is more stringent than the secondary containment option included in the federal Energy Policy Act. The Pennsylvania UST program will require total secondary containment for new and replacement UST systems throughout the Commonwealth while the federal program would require total secondary containment only if the tank system "is within 1,000 feet of any existing community water system or any potable drinking water well." 42 U.S.C. § 6991b(i)(1). Further, the Department has acknowledged in the past and continues to acknowledge that the UST system equipment costs are increased with the total secondary containment requirement. Even so, the Department believes that the approach outlined in the final-form rulemaking is in the best interest of the regulated community, the public, the environment and the Department.

First and foremost, requiring total secondary containment for new and replacement UST systems (double walled tanks and piping with sumps at tank risers and dispensers) will provide the maximum protection against releases of regulated substances. Federal study indicates total secondarily-contained systems have fewer failures or releases of regulated substances than single-walled UST systems. Fewer releases, and less severe releases, means less exposure to the public and environment to those regulated substances, and fewer resources needing to be devoted to corrective action. All interested parties currently incur those costs – the Department (both in terms of oversight of responsible party corrective action and direct state-lead corrective action), the Underground Storage Tank

Indemnification Fund (USTIF), the regulated community and the public. The public may be impacted directly, for example, where a homeowner's drinking water well is impacted, or indirectly, through the imposition of the "per gallon throughput" USTIF fee paid on each gallon of gasoline sold in the Commonwealth.

Second, since 1998, our records show approximately 60% of tanks and 80% of piping installed in Pennsylvania have been double-walled. Thus, we do not expect a major impact on industry practices from this decision. The regulated community already appears to realize the benefits of installing protective systems. The installer community already recommends installation of these systems, and notes that there is no increased installation cost associated with a total secondary containment UST system.

In addition to the benefits of a statewide "total secondary containment" option, there are several reasons why the Department does not believe that the Energy Policy Act's "1,000 foot" limitation makes sense. First, we note that the Storage Tank Act contains a presumption of liability in section 1311 for all

> damages, contamination or pollution within 2,500 feet of the perimeter of the site of a storage tank containing or which contained a regulated substance of the type which caused the damage, contamination or pollution.

35 P.S. § 6021.1311(a). At a minimum, then, the "total secondary containment" option in Pennsylvania should extend to 2,500 feet.

We also note that the federal "total secondary containment" option only extends protection to "existing community water systems" and "existing potable drinking water wells." The Department agrees that protecting those items is crucial, but protecting those items alone is not enough. Other items are also deserving of protection, but not covered by the Energy Policy Act, might include:

- planned locations for new community water systems or new potable drinking water wells;
- the entire extent of aquifers used to provide drinking water (the Energy Policy Act requirements are unclear as to whether or not the aquifer is protected, or only the well itself);
- wells providing water for "agricultural purposes," as that phrase is defined in 25 Pa.Code § 250.1 (relating to definitions);
- buildings with subsurface features that might be impacted by vapors from a release;
- "waters of the Commonwealth," as that phrase is defined in section 1 of the Clean Streams Law (35 P.S. § 691.1); and,
- other water supplies ("water supply" is defined in section 245.1 as "[e]xisting, designated or planned sources of water or facilities or systems for the supply of water for human consumption or for agricultural, commercial, industrial or other

legitimate use, protected by the applicable water supply provisions of § 93.3 (relating to protected water uses)").

By requiring total secondary containment for all new and replacement UST systems, the rulemaking protects these other items to the same extent the federal Energy Policy Act protects certain water supplies.

The Department further notes that extending the total secondary containment requirement statewide avoids a significant administrative burden. This burden consists of the effort required to determine whether or not a new or replacement UST system falls within the Energy Policy Act's limits, where such information can even be determined with any accuracy. Whether or not that burden is borne by the Department or the regulated community, it may swallow up any cost savings associated with the installation of a "lower quality" single-walled UST system. It should also be noted that there would be a delay in installation due to the necessity of conducting this review and making this determination that is avoided by the Department's preferred statewide approach. This delay could also include any litigation before the EHB (including third-party appeals) over the Department's decision that a particular UST system is or is not within 1,000 feet of a protected feature.

Finally, we note that there is the possibility of decreases in USTIF fees in the future as the UST system population in Pennsylvania is replaced by the more protective total secondary containment systems.

For all of these reasons, the Department believes that the approach outlined in the final-form rulemaking is in the best interest of the regulated community, the public, the environment and the Department, and so that approach is retained in the final-form rulemaking.

55. **Comment:** The rulemaking should be delayed until US EPA develops final grant guidelines for complying with the federal Energy Policy Act. One provision of the federal law, for example, provides that installer certification - which Pennsylvania currently requires - would eliminate the need for double wall piping and tanks in upgrades and new construction. The state's proposed regulations do not permit this as an alternative, but, if in place, would establish both as requirements.

Another concern that should be taken into account is the cost to the Commonwealth to implement the new federal regulations on storage tanks. In our view, the expectation of the Department in terms of federal funding is an important factor that should be considered as alternatives are chosen in the final regulation. (18)

Response: See responses to Comments 4, 5 and 54.

In supporting the "financial responsibility and certification" option for protecting groundwater over the "total secondary containment" option, the commentator appears to overlook a critical, and from our perspective, insurmountable obstacle to implementing that option. That obstacle is the requirement that:

> A person who manufactures an underground storage tank or piping for an underground storage tank system . . . is required to maintain evidence of financial responsibility under section 9003(d) in order to provide for the costs of corrective actions directly related to releases caused by improper manufacture . . .

42 U.S.C.A § 6991b(i)(2)(A). As a preliminary matter, it appears that the General Assembly might need to amend the Storage Tank Act to allow the Department to require, through regulations, such "manufacturer financial responsibility." Even if such a requirement was authorized, however, it is difficult to see how such a requirement could be implemented at the state level. Most manufacturers are located outside of the Commonwealth's jurisdiction, with their products coming into Pennsylvania through interstate commerce. Such commerce is traditionally a federal concern, and there are limits on the states' ability to regulate such commerce. If that hurdle were not high enough, the Department will be hard-pressed to pursue enforcement actions or cost recovery against manufacturers located outside of the Commonwealth.

Finally, the Department notes that there is another problem with the financial responsibility approach. This approach also requires that installers of underground storage tank systems maintain financial responsibility in accordance with section 9003(d) of RCRA. In final grant guidelines issued on January 22, 2007, the EPA established that states must require coverage amounts of $1 million per occurrence and $2 million annual aggregate for installers to cover the costs of corrective action of a release from a regulated underground storage tank system due to improper installation.

Pennsylvania does currently have a financial responsibility program for underground tank installers. Under section 704(b.1)(3) of the Storage Tank Act (35 P.S. § 6021.704(b.1)(3)), however, the annual aggregate amount of coverage available for "installers who perform 100 or fewer installations or major modifications" is only $1,500,000. Therefore, the Storage Tank Act would need to be amended to address this shortfall if the financial responsibility option were chosen.

Addressing the commentator's second concern, the Department acknowledges the additional requirements placed on the Commonwealth by the Energy Policy Act. The most implementable alternative, from an administrative perspective, is to meet the groundwater protection requirements by having all new and replacement UST systems be installed with total secondary containment. This avoids the need to implement a new manufacturer financial responsibility program, and avoids the burdens of attempting to determine whether a new or replacement UST is located in an area protected under the EPA grant guidelines.

The Department continues to urge the appropriation by Congress and the President of the additional Leaking Underground Storage Tank (LUST) Trust Fund money for the states and EPA authorized by the Energy Policy Act. To date, however, no additional funding appears to be forthcoming from that source. If such funding is forthcoming, however, the final-form rulemaking's requirements for total secondary containment for all new and replacement UST systems clearly meets the federal Energy Policy Act requirements, and would therefore qualify the Commonwealth for any LUST Trust Fund funding. See, Final Secondary Containment Grant Guidelines, issued by EPA on November 15, 2006, page 6.

56. **Comment:** The proposed amendment to section 245.421(b)(2) would require upgrading of all piping associated with a UST system to satisfy secondary containment standards whenever more than 30% of the system piping is going to be replaced. In addition to total secondary containment, the regulations should also allow owners and operators the option of meeting the Energy Policy Act of 2005 requirements to protect groundwater through providing financial assurance as outlined in Section 1526 that Act (42 U.S.C. 6991b(i)). Proceeding consistent with the federal approach on this issue should be sufficiently protective of possible releases from existing UST piping, while at the same time allowing the regulated community flexibility in applying resources to comply with the full range of storage tank program requirements. (8, 16, 20, 21)

Response: See response to Comment 55. The final-form rulemaking has been amended to reflect the requirement that replacement of all piping that routinely contains and conveys regulated substances from the tank with secondarily-contained piping must occur only when more than 50% of this piping is replaced.

57. **Comment:** Testing sumps, UDCs and spill buckets at installation is a step in the right direction. Further measure should be required by the Department to verify the performance of this equipment, however. Specifically, the regulations should require testing these devices at periodic intervals, such as annually for spill buckets and a minimum of once every three years for UDCs and sumps used for interstitial monitoring of secondarily contained piping. These components do not have an unlimited lifetime and our experience (as well as studies conducted in other states) shows that these components fail over time and are a major source of releases and contamination at UST facilities. If such testing is required, it should be limited to companies and individuals holding UTT certification from the Department, given the many factors that can influence the testing of such devices (e.g., temperature, deflection, etc.). (5)

Response: Testing this equipment at installation and when repairs are performed is consistent with equipment manufacturer's recommendations and Federal UST requirements. UTT certification is not necessary. Periodic routine testing of this equipment goes beyond Federal testing requirements and could subject the Department to reimbursement for the costs of routine testing under section 507(a) of the Storage Tank Act (35 P.S. § 6021.507(a)). Also, during the routine 3-year facility operations inspection, the third-party inspector visually inspects this equipment. The Department believes that this is adequate.

58. **Comment:** If the Department chooses to require secondary containment to meet the requirements of the Energy Policy Act of 2005, then replacement of piping with identical materials should not trigger the upgrade requirement, regardless of the percentage of piping replaced (up to and including 100%). This would be more consistent with Federal requirements for authorized state UST programs. (8, 16, 20)

Response: The Department does not agree. See responses to Comments 56 and 59. Further, this would be in conflict with the Energy Policy Act. See, Final Secondary Containment Grant Guidelines, issued by EPA on November 15, 2006, pages 4-5. Piping associated with USTs is a significant source of contamination in the Commonwealth.

When piping replacement is over the 50% threshold, such replacement must meet the new UST system standards, i.e., total secondary containment piping, rather than simply replacing old piping with less protective equipment.

59. **Comment:** If the EQB still feels a percentage of piping replacement is needed to require full upgrade of piping, the percentage should be increased to whenever more than 50% of the system piping is replaced. (20)

Response: The Department agrees with the commentator. See response to Comment 56.

60. **Comment:** It is not entirely clear whether or not the "liquid-tight containment sumps, manway riser sumps and dispenser pan sumps" required by this section must be double-walled. Also, we believe that by definition, vapor and vent piping as well as other equipment related to vapor recovery would not be included in the requirement for double-walled piping. Remote fills and associated piping should fall under the requirement for secondary containment, however. These points should be clarified in the final rulemaking. (12)

Response: The Department acknowledges the commentator's concerns. This section clearly only requires that the tank and piping be double walled. The sumps serve as the secondary wall for the piping and tank junctions or connections, which are typically, single walled connections. The final-form rulemaking has been amended to clarify this point and to indicate that the double walled piping requirement applies only to piping that routinely contains a regulated substance, which does not include vapor recovery, vent or fill piping.

61. **Comment:** The records retention requirements in subsection (b)(2)(iii)(B) should be amended. The records required are not always available for existing facilities when a change in ownership occurs. For existing tank systems, especially those acquired through an acquisition, some of the records requirements may not be obtainable and are not always provided during the acquisition. Examples of some records that may not be available or provided during a facility transfer are: tank design and construction documentation, proof that field-installed cathodic protection systems or impressed current systems were designed by a corrosion expert and proof that a certified installer installed the tank. It is suggested that these requirements only apply to new installations, or at a minimum, to existing systems installed after the effective date of the regulations. (20)

Response: The Department does not agree with the commentator. Many components of underground storage tank systems are buried and inaccessible. Short of excavating the system, appropriate records are the only method of establishing what cannot be seen. Failure to maintain records, either through an ownership change or other circumstances should not be an excuse. Current state regulations and federal requirements in 40 CFR 280.20(b)(3)(ii) require the retention of these records for the operating life of the piping system. In deference to the commentator's concern, section 245.435(b)(2)(ii) is amended in the final-form rulemaking to indicate that some similar form of information that demonstrates compliance with sections 245.421(b)(2)(ii)(B), 422(b)(2) and 422(c)(2) may be acceptable.

62. **Comment:** In subsection (b)(2)(ii)(A), it has been demonstrated within the industry that, especially for risers, wrapping of piping is an effective method of corrosion protection. Furthermore, if the EQB feels that wrapping alone is not sufficient, this section should clarify that wrapping used along with appropriate coatings does meet the cathodic protection requirement. (20)

Response: The Department does not agree with the commentator. This section already adequately addresses coating with a suitable dielectric material. Piping coated with such material is considered to be protected, whether it is wrapped or not wrapped. The final-form rulemaking also correctly indicates that wrapping alone is not sufficient corrosion protection for metal piping. However, the majority of riser pipes do not fall under this subsection; it only applies to piping that routinely contains product. Fills, vents, vapor recovery and gauge risers do not routinely contain product.

63. **Comment:** Subsection (a) pertains to new underground storage tank systems. Subsection (a)(3) states the following: "An owner or operator of a tank system changing from unregulated to regulated service shall provide certification or documentation that the tank system meets new tank system requirements." Subsection (a) relates to new tank systems, but subsection (a)(3) relates to existing tank systems. The requirements of subsection (a)(3) should be moved to a separate subsection that addresses the requirements for owners or operators changing from unregulated to regulated service. (21)

Response: A new tank is one that has never stored regulated substance and has never been registered in accordance with the Storage Tank Act or section 245.41. All new tanks are required to be installed by a certified tank installer; that probably was not the case for a tank that has previously held an unregulated substance. This paragraph gives an owner of this type of tank a way to meet the technical standards without closing the old tank and installing a new UST.

64. **Comment:** Subsection (a) pertains to new UST systems. Subsection (a)(3) states the following: "An owner or operator of a tank system changing from unregulated to regulated service shall provide certification or documentation that the tank system meets new tank system requirements." This provision should include a time frame for when the certification or documentation must be provided, and what type of certification or documentation would be acceptable to prove the tank system meets the new tank system requirements. (21)

Response: This subsection has been amended in the final-form rulemaking to designate those that can certify the system installation, when it must be certified and what documentation must be provided to the Department. These additions are consistent with tanks initially installed for storing regulated substance and for reuse of removed tanks.

§ 245.422. Upgrading of existing underground storage tank systems.

65. **Comment:** This section contains major new retrofit and upgrade requirements that merit further public discussion. This includes release detection equipment required to be upgraded for systems using interstitial monitoring or electronic line leak detection from an

alarm to an automatic shut-off device. We therefore request a public hearing to address this portion of the proposed rulemaking. (12)

Response: The Department acknowledges the commentator's concerns about a potentially major upgrade program. The final-form rulemaking has been amended to require upgraded release detection and line leak detectors only for new and replacement UST systems.

66. **Comment:** We recommend that the paragraph on interior lining explicitly reference American Petroleum Institute Recommended Practice 1631, Interior Lining and Periodic Inspection of Underground Storage Tanks. This document covers recommendations for the interior lining of existing steel and fiberglass reinforced plastic USTs used to store petroleum motor fuels as well as the inspection of those liners. (12)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to reference API RP 1631 and National Leak Prevention Association (NLPA) Standard 631 "Entry, Cleaning, Interior Inspection, Repair and Lining of Underground Storage Tanks."

67. **Comment:** The requirement for an electronic line leak detector is too restrictive and there are no other options. Clarification as to if these regulations are applicable to single-wall and double-wall piping is requested. Are mechanical leak detectors acceptable with double-walled piping? Are the electronic leak detectors only applicable to single-walled piping? (20)

Response: Subsection (e) does not require an electronic line leak detector (LLD). This requirement is for a pump shutoff. This requirement is consistent with federal rules at 40 CFR 280.44(a). This may be accomplished with an electronic LLD, a properly configured interstitial monitor or a mechanical LLD with appropriate control circuitry. There is no distinction within this section as to single wall or double wall piping; it applies equally to both. The interstitial option only applies when an interstice exists. See response to Comment 65.

68. **Comment:** We agree with the proposed requirement to install line leak detection systems with automatic shut-off devices on tank systems installed after the effective date of the adoption of the proposed amendments. However, tank-systems existing prior to the effective date of the adoption of the amendments should not be required to upgrade their systems currently installed with equipment that alarms or restricts product flow. The equipment currently required to be installed on existing equipment is effective in the prevention of releases, consistent with federal environmental law, and is protective of human health and the environment. (19)

Response: The Department appreciates the commentator's recognition of the need for more effective line leak detection systems on new UST. See response to Comment 65.

69. **Comment:** The type of piping that section 245.422(e)(2) and (3) apply to is not entirely clear. If these paragraphs remain, it should be made clear that the requirements only apply to pressure piping. (19)

Response: Even though paragraphs (2) and (3) only apply to line leak detectors provided on pressurized piping systems, the Department recognizes that it may be incorrectly applied to suction systems. Therefore, subsection (e) has been amended in the final-form rulemaking to clarify that the provision only applies to pressure piping systems. See response to Comment 65.

§ 245.432. Operation and maintenance including corrosion protection.

70. **Comment:** The proposed amendment should be revised to exclude fiberglass reinforced plastic (FRP) tanks. FRP tanks are not subject to internal corrosion from contact with water and the subject rules should be limited to protecting human health and the environment. (19)

Response: The Department does not agree with the commentator. FRP tanks are subject to microbial growth. There is limited research that links microbial growth to the degradation (corrosion) of fiberglass tanks. The presence of water and bacteria can interfere with or disable tank release detection, regardless of the type of tank. If water is not properly managed and removed it can be pumped throughout the tank system and damage ancillary equipment. Improper water management within a tank may also cause phase separation of the fuel components and render the tank contents (fuel) unusable, necessitating product disposal as a waste. The Fiberglass Tank and Pipe Institute also recommends operating fiberglass tanks in accordance with API RP-1621, including the removal of tank water bottoms. The Department believes it is important to prevent degradation in all product-containing components. The proper management of water is a good beginning to this task, especially in gasoline tanks containing ethanol additives. Therefore, the final-form rulemaking has been amended to indicate that no amount of water is desirable in gasoline containing ethanol.

71. **Comment:** Subsection (e) is not clear and methods to check for a leak in the interstitial space of secondary piping are not currently available. (20)

Response: Interstitial monitoring of piping is a common practice and the methodologies are well known. The regulatory requirements for interstitial monitoring are contained within § 245.444(7). It was not the Department's intention to require release detection inside the interstice only. The wording of this subsection has been modified to clarify that any portion of the secondary containment structure may be monitored. In the case of secondarily contained piping systems, this is normally accomplished either by visually or electronically monitoring a sump at low points in the piping run.

72. **Comment:** Under subsection (f), excess water in petroleum tanks must be disposed in accordance with "applicable State and Federal requirements." The final-form regulation should reference the applicable requirements. Similar language is found at § 245.451(c). (21)

Response: This language is included in Chapter 245 to put tank owners, operators and certified individuals on notice that requirements outside of the Storage Tank Act may apply to the management of excess water removed from a petroleum UST. The proper management of excess water removed from petroleum USTs is determined on a case-by-

case basis depending on the particular characteristics of the contaminated water and the end use of the material. Therefore, tank owners, operators and certified individuals faced with the question of proper handling should contact the Department's Waste Management Program in the regional office where the facility is located for detailed assistance. The final-form rulemaking has been amended to show examples of state and federal requirements.

§ 245.435. Reporting and recordkeeping.

73. **Comment:** The proposed requirement in subsection (b)(2)(vii) to permanently maintain all tightness test records of containment sumps and dispenser pans is excessive. Records should be required for the most recent liquid tight test. Keeping records of all liquid tight testing throughout the life of a tank system would be impracticable and difficult to maintain. (20)

Response: Although the Department agrees that keeping all records may be difficult, it does not agree that it is impracticable. To ease the recordkeeping burden on the owner and operator, the Department has amended the recordkeeping requirement for sump testing in the final-form rulemaking to be similar to the commentator's suggestion and consistent with tank tightness testing recordkeeping requirements in 40 CFR 280 and Chapter 245.

§ 245.441. General requirements for underground storage tank systems.

74. **Comment:** Subsection (e) is not clear and clarification on how to check for a leak in the interstitial space of secondary piping is needed. (20)

Response: The intent of this subsection is to establish a frequency of operation. The requirements for interstitial monitoring are located in 245.444(7). This section does not require that a monitor be placed within the interstice, only that the interstice be monitored. A reference to the interstitial section of the subchapter is added to clarify that interstitial monitoring is the method to use to monitor the interstice and a future date to meet this requirement is added.

75. **Comment:** Subsection (e) requires monthly monitoring of certain existing tank system equipment "when practicable." "When practicable" should be replaced with a term or phrase that is definitive and enforceable, or specify when monthly monitoring would not apply. Similar language is found at section 245.553(c), relating to out-of-service inspections. (21)

Response: The Department amended this section in the final-form rulemaking to add clarity and to provide a future date for existing tank systems to meet this requirement. See response to Comment 74.

§ 245.442. Requirements for petroleum underground storage tank systems.

76. **Comment:** This section is not clear and clarification is needed on how to check for a leak in the interstitial space of secondary piping and how these regulations apply to single-walled vs. double-walled piping. (20)

Response: Subsection 245.442(a) only applies to new UST systems, which are required to have secondary containment. Interstitial monitoring should be performed in accordance with section 245.444(7), which is referenced in section 245.442(a). No further clarification should be necessary. See response to Comment 74.

§ 245.444. Methods of release detection for tanks.

77. **Comment:** The requirement that the evaluation of the site and the attendant report authentication must be performed by a professional geologist is inappropriate as no geologic interpretation is being performed. This appears to be a mis-interpretation of the Engineer, Land Surveyor and Geologists Registration Law. This requirement unfairly restricts many professional engineers in civil, environmental, geotechnical, and groundwater engineering disciplines from performing work within their area of professional expertise. This requirement also unnecessarily increases the cost of storage tank installations. At a minimum, the language should be expanded to allow the evaluation and certification to also be performed by a professional engineer. What is the EQB's statutory authority for allowing only professional geologists to perform the site evaluations? (6, 13, 21)

Response: The Department acknowledges that the language in the proposed rulemaking may be too limiting, yet we are concerned that professionals with proper experience and credentials perform work associated with regulated storage tanks. For those reasons, this requirement is deleted in the final-form rulemaking. In its place, the final-form rulemaking contains a broad requirement similar to that already found in the corrective action process regulations at section 245.314 (relating to professional seals). If an activity consists of a practice regulated by the Engineer, Land Surveyor and Geologists Registration Law, then a properly licensed individual must perform the activity or provide a seal on a report submitted to the Department. The Department of State administers that statute and retains authority over its implementation. However, sections 501(a)(2) and (7) of the Storage Tank Act (35 P.S. § 6021.501(a)(2) and (7)) require the Department to develop and implement a regulatory program concerning leak detection systems and the proper installation of USTs. Because the laws of the Commonwealth require that properly qualified individuals carry out certain tasks relating to storage tanks, the final-form rulemaking reflects those requirements.

78. **Comment:** The requirement to use a professional geologist when using the release detection methods of vapor or groundwater monitoring is of questionable value. It should only be required where such monitoring is being installed and not at existing sites. (12)

Response: See response to Comment 77.

79. **Comment:** This proposed amendment changes the requirement in subsection (3) for tightness tests performed by an automatic tank gauge (ATG) from that portion of the tank that routinely contains product to 90% of the overfill set point.

Monthly testing of tank by an automatic tank gauge to 0.2 GPH is not the same as tank tightness testing to 0.1 GPH. The EPA has separate third party testing protocols for

tightness testing and monthly monitoring; most ATG's do not have third party for tank tightness testing. I believe the intent of this change is for tank tightness testing and not for monthly ATG monitoring. I recommend that only paragraph 3 (tank tightness testing) be changed and that paragraph 4 (ATG monitoring) remains as it currently exists. If paragraph 4 is changed, it will require the tanks to be filled to the top at least once a month at huge expense if normal volume is always less than 50%. (9)

Response: The Department acknowledges the commentator's concerns and has removed the requirement from the final-form rulemaking for the tank to be filled to the overfill set point when using an ATG to perform a tank tightness test. The requirement for certification of an ATG in paragraph 4 applies only to an ATG installed prior to December 22, 1990, as established in federal requirements at 40 CFR Part 280, which were not certified by the ATG manufacturer to perform product monitoring that can detect a 0.2 gallon per hour leak rate (not a tank tightness test). The final-form rulemaking has been amended to clarify this issue.

§ 245.445. Methods of release detection for piping.

80. **Comment:** The proposed amendment will require the line leak device to shut off the flow of regulated substance when a leak is detected. Does this change apply to the detection of a 3-gallon per hour (GPH) leak rate and not to the monthly monitoring 0.2 GPH leak detection requirement? The amendment should include the required minimum leak rate for shut down. Automatic shut down at 0.2 GPH or less, has and will result in many false alarms resulting is considerable loss of revenue.

If automatic shut down is required, even at 3 GPH, owners will disable or bypass this function (jumper the relay) when a false alarm prevents him from selling product. This has happened in the past and defeats the purpose of automatic shut down to contain leaks. The best method to achieve the desired leak detection containment (short of double wall piping) is for mechanical line leak detection (3 GPH) with automatic slowing of flow when a leak is detected. This method is not easy to bypass and will cause the station operator to take action by calling a servicing company so that he can sell product. Requiring a service log to be maintained, will track leak detection occurrences and actions taken and should be available for inspectors to review. (9)

Response: The commentator is correct; the automatic shut off provision in section 245.445(1) only applies to the 3 GPH release (line leak) detection method. As in the past, if owners disable required release detection equipment, the Department will pursue enforcement action using the enforcement tools available to the Department under the Storage Tank Act.

The Department acknowledges the commentator's concerns about replacing automatic line leak detectors (aLLD) on an existing system with a leak detector that shuts off the flow of product when triggered. The final-form rulemaking is amended to require only the upgrade of an existing line leak detector to an aLLD that shuts of the flow of product, when the entire piping system to the dispenser or the entire release detection system is replaced.

Following the requirements of the federal regulations, Chapter 245 already requires service logs for all permanently installed release detection equipment. The previous 12 months' worth of maintenance data must be available to Department and third-party certified inspectors for review during their inspections.

81. **Comment:** The amendment to subsection (1) has caused some confusion. Some have assumed the proposed amendment to mean electronic line leak detection is required. The wording here should be clear as to the intent and requirements of this amendment. (9)

Response: The Department acknowledges the commentator's concerns. This section allows for other line leak detection devices besides electronic. The final-form rulemaking has been amended and adds clarity to this section. Also see response to Comments 65, 68 and 80.

82. **Comment:** We agree with the proposed requirement to install line leak detection systems with automatic shut-off devices on tank systems installed after the effective date of the adoption of the proposed amendments. However, tank-systems existing prior to the effective date of the adoption of the amendments should not be required to upgrade their systems currently installed with equipment that alarms or restricts product flow. The equipment currently required to be installed on existing equipment is effective in the prevention of releases, consistent with federal environmental law, and is protective of human health and the environment. (19)

Response: See response to Comments 65 and 68.

§ 245.451. Temporary closure (out-of-service).

83. **Comment:** This section should be amended to waive inspections for USTs in temporary closure status, or when permits are withheld or withdrawn. Instead, the Department should require inspection of such tanks prior to permitting, or changing the tank status from non-operating back to operating. (2)

Response: The Department agrees with the commentator, and the final-form rulemaking has been amended to reflect the waiver of inspections and withdrawal or withholding of operating permits when tanks are placed in temporary closure or out-of-service status. Related changes are included in the tank registration and operating permit provisions in Subchapters A and C.

84. **Comment:** The regulations should allow owners and operators 30 days to empty an UST being placed into temporary out-of-service status rather than requiring "immediate" emptying of the UST, which is technically infeasible. (20)

Response: The Department recognizes the commentator's concerns and has amended the final-form rulemaking to require that a temporary out-of-service UST be emptied within 30 days or prior to reporting the UST change in operating status to the Department, whichever occurs first, unless notified otherwise by the Department.

§ 245.453. Assessing the site at closure or change-in-service.

85. **Comment:** Although the Board did not propose amending this section, the language "unless otherwise agreed upon or waived by the Department," presently included with the proposed AST closure technical document reference in section 245.561(3), should also be added to subsection (a). This would give regulated persons some flexibility on a case-specific basis. (16)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to clarify that the standard of performance established by this section is for the tank owner/operator to "measure for the presence of a release where contamination is most likely to be present at the underground storage tank site" upon closure of the UST. If a tank owner/operator chooses to follow the Department's technical guidance document, then the owner will have met the standard of performance. Alternatively, the tank owner/operator may choose not to follow the guidance document, but instead use another process for proper site assessment that equally protects the public and the environment and that meets all regulatory and statutory requirements.

§ 245.503. Variances.

86. **Comment:** Dominion supports the proposed changes, allowing variances when unique or peculiar circumstances make compliance technically impractical and allowing variances for the use of new technologies. (8)

Response: The Department acknowledges and appreciates the commentator's support for the proposed changes to this section.

§ 245.505. Applicability.

87. **Comment:** Dominion supports the proposed changes providing temporary exclusions with a phase-in period for existing large ASTs that become regulated due to changes to the definition of "regulated substance" or heating oil ASTs that become re-regulated due to changes to the definition of "consumptive use." (8)

Response: The Department acknowledges and appreciates the commentator's support for the proposed changes to this section.

§ 245.523. Aboveground storage tanks in vaults.

88. **Comment:** Paragraph (11) requires certain underground piping distribution systems to "be appropriately monitored." The term "appropriately" is indefinite. The final-form regulation should include specific monitoring requirements. (21)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to clarify that the underground piping must be monitored as required in paragraph (7) and monitoring records retained for 12 months as required under sections 245.516 or 245.615.

§ 245.534. Interior coatings and linings.

89. **Comment:** Subsection (c) will require inspections when "major modifications" are made to interior linings or coatings. The phrase "major modifications" is vague and indefinite. The criteria used to determine if a modification is major should be included in the final-form rulemaking. Similar language is also found at section 245.552(e) (relating to in-service inspections). (21)

Response: The Department does not agree with the commentator. The term "major modification" is clearly and adequately defined in section 245.1 and that definition is applicable to the referenced sections in this comment.

§ 245.541. Overfill prevention requirements.

90. **Comment:** The Department should alter the proposed amendment to subsection (e) to allow for the use of a visual gauge, in lieu of a high-level alarm, if the large AST also has a manned operator shutdown procedure. Our experience is that the use of visual gauges has proven satisfactory to prevent overfills at facilities with manned operations. The installation of high-level alarms will require emptying and cleaning of the large ASTs prior to working on them. That is an expensive and potentially dangerous proposition, and is not justified prior to the next scheduled removal from service (i.e., an out-of-service inspection). (8, 16, 21)

Response: The Department acknowledges the commentator's concerns. The current regulatory requirements for installation of high-level alarm when a large AST is taken out-of-service have been in place since October 11, 1997 and the Department believes these requirements are appropriate. No additional deadlines are necessary for these tanks. However, ASTs that do not routinely undergo out-of-service inspections may still need to address overfill prevention. Therefore, the final-form rulemaking has been amended to reflect overfill protection requirements consistent with national industry standards, such as API 2350, NFPA 30 or PEI RP 200 for saddle-mounted ASTs and ASTs that are not routinely required to conduct out-of-service inspections.

91. **Comment:** Three-year installation requirements for alarm systems and emergency containment structures do not take financial and logistical considerations into account. The requirements under section 245.541(e) for high-level alarm with a cut-off device installation within three years will be difficult for industry to achieve. These changes must be properly planned and engineered, and a contractor must be employed to install them, much of which is completely out of the hands of a manufacturer. This process could stretch over the span of several years. We recommend that the language be amended in order to give industry flexibility to fulfill this requirement. (17)

Response: See responses to Comments 90 and 96.

§ 245.542. Containment requirements for aboveground storage tank systems.

92. **Comment:** This section appears to mandate the use of Department guidance documents to comply with the requirements to verify permeability of emergency containment structures. By mandating the use of guidance documents, the Department is circumventing the

opportunity for industry and citizens to comment on revisions to the regulations since guidance documents are not subject to the same notice and review provisions that apply to regulations. The reference to the guidance document should therefore be removed, and the requirements in the technical guidance document should be included in the final-form rulemaking. (4, 19, 21)

Response: The Department acknowledges the commentator's concerns. This section established the standard of performance for "verification by a professional engineer that the emergency containment structure, coupled with the tank monitoring program and response plan, is capable of detecting and recovering a release and is designed to prevent contamination of the waters of this Commonwealth." The final-form rulemaking is amended to clarify that the guidance is available for use when conducting this verification. If a tank owner chooses to follow the procedures in the technical guidance document, then the owner will have met the standard of performance. Alternatively, the tank owner/operator may choose not to follow the guidance document, but instead use another verification process that equally protects the public and the environment and that meets all regulatory and statutory requirements.

93. **Comment:** The incorporation of guidance or technical documents within this regulation is of concern because the opportunity for external review and comment on such documents is much more limited than is the case with actual regulations. For instance, proposed and final EQB rulemakings are subject to review by legislative standing committees and the Independent Regulatory Review Commission, which can represent important checks on a regulation's consistency with legislative intent, reasonableness and cost-effectiveness; technical documents do not receive these levels of review. In addition, referring to technical documents to provide acceptable industry test methods, as would be the case for permeability testing in section 245.542(d)(2)(ii), would be inconsistent with other aspects of the rule in which industry methods are incorporated directly into the regulation itself. Accordingly, references to technical documents in the rule should be removed and, if necessary, replaced with substantive provisions. (16)

Response: See response to Comment 92. In addition, examples of industry standards on test methods for determining permeability (such as various ASTM methods and engineering standards listed in API Publication 351) have been added to this section of the final-form rulemaking.

94. **Comment:** To the extent references to technical documents remain in the rulemaking, the language "unless otherwise agreed upon or waived by the Department," presently included with the proposed AST closure technical document reference in section 245.561(3), should also be added to the proposed AST emergency containment verification technical document reference in section 245.542(d)(2)(ii). This would give regulated persons some flexibility on a case-specific basis. (16)

Response: The Department does not believe that the commentator's recommended addition is needed. The current regulation provides for a wide array of considerations that are ultimately evaluated and verified by a professional engineer on a case-specific basis. If additional considerations are needed, the variance process at section 245.503 is available.

95. **Comment:** This section requires a determination of the containment structure permeability to be determined, but does not list any methods or alternatives, which is in conflict with other sections of Chapter 245. (4)

Response: See responses to Comments 92 and 93.

96. **Comment:** Three-year installation requirements for alarm systems and emergency containment structures do not take financial and logistical considerations into account. The requirements for emergency containment structures to be upgraded under section 245.542(d) within three years or before the next scheduled out-of-service inspection will be difficult for industry to achieve. These changes must be properly planned and engineered, and a contractor must be employed to install them, much of which is completely out of the hands of a manufacturer. This process could stretch over the span of several years. We recommend that the language be amended in order to give industry flexibility to fulfill this requirement. (17)

Response: The Department acknowledges the commentator's concerns. See response to Comment 90 on requirements for overfill alarms. The Department believes that 3 years is adequate to meet emergency containment requirements retained in the final-form rulemaking. The standards for emergency containment have been in place in the current regulations since October 11, 1997. There has been ample time for the regulated community to be aware of the emergency containment standards and to plan to meet these standards. The new 3-year deadline to meet emergency containment requirements only affects ASTs that are not required to conduct routine out-of-service inspections and those that may not have routine scheduled out-of-service inspections since 1997. Additionally, under federal OSHA standards and Oil Pollution Program requirements in 40 CFR Part 112, all aboveground storage tanks should already have adequate containment.

§ 245.543. Leak detection requirements.

97. **Comment:** In subsection (c), the requirement to test the ASTs at issue for tightness at the next service inspection is unclear. Is this intended to be the next in-service inspection or the next out-of-service inspection? Please clarify. (7, 10)

Response: The requirement for testing the AST is applicable to both in-service and out-of-service inspections. However, the Department believes that changes reflecting nondestructive examinations that must be performed during an out-of-service inspection now adequately satisfy evaluation of the tank bottom during the out-of-service inspection. Therefore, the final-form rulemaking has been amended to only require a separate leak test during the in-service inspection.

98. **Comment:** We would appreciate clarification of subsection (c). This subsection requires large ASTs "without secondary containment under the bottom of the tank" and that "do not have cathodic protection or an internal lining" to be "tested for tightness at the next scheduled service inspection." We understand this to mean that only large ASTs without secondary containment and cathodic protection must be tested for tightness. Please clarify when this requirement applies. (12)

Response: This subsection applies to large ASTs the do not have secondary containment under the tank bottom or one of two forms of corrosion prevention for the tank bottom. Cathodic protection and internal lining both serve as forms of corrosion prevention for the tank bottom, one form providing external protection and the other form providing internal protection against corrosion. Having either secondary containment, cathodic protection or internal lining precludes the tank from this testing requirement. The Department believes that the rulemaking is clear on this requirement. Also, see response to Comment 97.

99. **Comment:** Subsection (d) references *API Publication 334, A Guide to Leak Detection for Aboveground Storage Tanks*. We note that this document describes methods for detecting leaks, which is not necessarily the same thing as "tightness testing," which subsection (d) is intended to address. We would like to have the opportunity to discuss this in further detail with the Department and, at a minimum, suggest that the term "tightness testing" be changed to "leak detection." (12)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to require a leak test, rather than testing for tightness. This is consistent with the testing terminology in API Publication 334. Further, specific leak test methods that will satisfy this requirement have been added to this section of the final-form rulemaking. See response to Comment 97.

100. **Comment:** We have five questions concerning subsection (d). First, what is required for a third party to certify the test method and procedure to be used? The final-form regulation should provide details on how certification is accomplished. Second, if a National association must recognize the method or procedure, what is the need for the certification? Third, why must a third-party expert perform the test? Fourth, who determines if the third-party is an expert? Finally, can the party that performs the pre-test certification be the same party that performs the test? (21)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended and the requirement for certification clarified. The final-form rulemaking also addresses the test methods that may be used to satisfy the testing requirement and that a third-party inspector or an industry technician experienced in the test method and certified under American Society for Nondestructive Testing (ASNT) standards recognized by the test equipment manufacturer must perform the test. The STAC recommended that the final-form rulemaking require tests to be performed by a third-party expert, and not an employee of the tank owner, and the leak tests are conducted as part of the inspection process. Typically, industry leak testing experts other than employees of the tank owner perform such highly technical work on ASTs, and the Department believes that this approach is appropriate. See response to Comment 99.

§ 245.554. Installation and modification inspections.

101. **Comment:** Keeping the installation inspection report for the operational life of the AST is not necessary once a more recent out-of-service inspection report is available. This requirement should be modified to only require keeping the initial installation inspection report until it is replaced with the report for the first out-of-service inspection. (20)

Response: The Department does not agree with the commentator. The installation inspection is not the same as an out-of-service inspection. The installation inspection report typically contains information that may not be included on the out-of-service inspection report, and the Department believes that inspection reports for installation, modification and out-of-service inspections should be retained for the operational life of an AST. The current regulations allow for retaining the most recent in-service inspection. All other inspection reports must be retained for the operational life of the AST.

§ 245.561. Permanent closure or change-in-service.

102. **Comment:** This section should be amended to waive service inspections for large ASTs in temporary closure status, or when permits are withheld or withdrawn. Instead, the Department should require inspection of such tanks prior to permitting, or changing the tank status from non-operating back to operating. This is especially true for large ASTs, which will likely have a service inspection due within the five-year temporary removal from service window. Requiring such a costly inspection on a tank that may never be placed back into active service does not make sense. (2)

Response: The Department acknowledges the commentator's concerns. Section 245.562 of the final-form rulemaking has been amended to address these concerns. Permanent closure or change-in-service requirements in section 245.561 are not applicable to temporary closure status. See responses to Comments 104 and 105.

103. **Comment:** This section appears to mandate the use of Department guidance documents to comply with the requirements to properly close large AST systems. By mandating the use of guidance documents, the Department is circumventing the opportunity for industry and citizens to comment on revisions to the regulations since guidance documents are not subject to the same notice and review provisions that apply to regulations. The reference to the guidance document should therefore be removed, and the requirements in the technical guidance document should be included in the final-form rulemaking. (4, 16, 19, 21)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to clarify that the standard of performance established by this section is for the tank owner/operator to "complete a site assessment to measure for the presence of any release from the storage tank system" upon closure of the AST. If a tank owner/operator chooses to follow the Department's technical guidance document, then the owner will have met the standard of performance. Alternatively, the tank owner/operator may choose not to follow the guidance document, but instead use another process for proper site assessment that equally protects the public and the environment and that meets all regulatory and statutory requirements.

§ 245.562. Temporary removal-from-service.

104. **Comment:** This section should be amended to waive service inspections for large ASTs in temporary closure status, or when permits are withheld or withdrawn. Instead, the Department should require inspection of such tanks prior to permitting, or changing the tank status from non-operating back to operating. This is especially true for large ASTs, which will likely have a service inspection due within the five-year temporary removal

from service window. Requiring such a costly inspection on a tank that may never be placed back into active service does not make sense. (2)

Response: The Department acknowledges the commentator's concerns and agrees with the commentator. The final-form rulemaking has been amended to allow routine scheduled service inspections to be delayed on tanks that are in temporary closure or out-of-service status. The delayed inspections must be performed, submitted to the Department and deficiencies remedied prior to placing regulated substance back into the tanks and returning them to operational service. See responses to Comments 26, 38 and 83.

105. **Comment:** Although the Board did not propose amending this section, the subsection (f) requirement for temporary out-of-service large ASTs to be closed within five years is misguided, given the uncertain nature of the regulated industry and unforeseen changes in the future. This requirement should be replaced with two concepts: (1) in-service inspections would need to resume if the AST was in temporary out-of-service status for more than five years; and, (2) a full-blown API 653 out-of-service inspection would need to be conducted and any necessary upgrades completed prior to placing the AST back in service. (2)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to address inspection concerns (see response to Comment 104). The Department does not believe that an unlimited temporary out-of-service period is appropriate for all large ASTs. However, the final-form rulemaking amends the variance provisions in section 245.503, which may be used to allow for extending the temporary out-of-service timeframe where ASTs may need to be retained further for anticipated or potential future operational use.

106. **Comment:** This section unnecessarily limits large AST tank owners to three options when placing the tank into temporary out-of-service status – continuing service inspections, permanent closure or application for a variance from the regulations to remain in temporary out-of-service status. A better approach would be to allow for unlimited time in temporary out-of-service status, so long as the requirements of section 245.562(a)-(d) are followed, combined with the requirement that an out-of-service inspection be completed and any deficiencies corrected prior to putting the large AST back into operating service. (14, 16)

Response: See responses to Comments 104 and 105.

§ 245.612. Performance and design standards.

107. **Comment:** Please clarify in subsections (d) and (e) if it is the intention of the Department to have any one (1) of the listed controls meet the need for additional spill and overfill protection on double-walled small ASTs. Implementing each alone should provide added benefits. Also, please clarify in subsection (e) that existing small double-walled ASTs without these controls have three (3) years to implement this change. (15)

Response: The Department acknowledges the commentator's concerns. The measures addressed for double-walled small aboveground storage tanks are required by EPA to meet Oil Program requirements in 40 CFR 112.7 and are also reflected in NFPA 30, and PEI

Recommended Practice 200 for installation of manufactured aboveground storage tanks. PEI RP 200 provides detailed diagrams with instructions on when specific valves, cutoffs and controls should be used. To help clarify when each of the listed controls are needed, the final-form rulemaking has been amended to include specific reference to PEI RP 200 and NFPA 30. The 3-year delay for tanks containing newly regulated substances and heating oil consumed on the premises has been addressed in the final-form rulemaking in section 245.605.

§ 245.614. Requirements for closure.

108. **Comment:** This section should be amended to waive service inspections for small ASTs in temporary closure status, or when permits are withheld or withdrawn. Instead, the Department should require inspection of such tanks prior to permitting, or changing the tank status from non-operating back to operating. (2)

Response: The Department acknowledges the commentator's concerns. The final-form rulemaking has been amended to allow routine scheduled service inspections to be delayed on tanks that are in temporary closure or removal from service status. The delayed inspections must be performed, submitted to the Department and deficiencies remedied prior to placing regulated substance back into the tanks and returning them to operational service. Also see responses to Comments 27 and 38 addressing tank registration and permitting requirements.

§ 245.704. General requirements.

109. **Comment:** The proposed rulemaking indicates that USTIF deductible coverage must be approved under section 701(b) of the Storage Tank Act (35 P.S. § 6021.701(b)). It is unclear whether the Department will require submission of individual deductible coverage mechanisms for approval, or if the Department is proposing to deem the listed methods as approved by rule. This should be clarified. (10)

Response: The Department acknowledges the commentator's concerns. The Department is not requiring routine submission of individual deductible coverage mechanisms for approval. Rather, the changes are intended only to address the mechanisms an owner may use to meet coverage requirements. The final-form rulemaking has been amended to further clarify this point.