WEST VIRGINIA LEGISLATURE

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Introduced

House Bill 4083

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BARNHART, WAMSLEY AND RILEY

[Introduced January 14, 2022; Referred to the

Committee on Energy and Manufacturing then the

Judiciary]

A BILL to amend and reenact §22-30-3 and §22-30-5 of the Code of West Virginia, 1931, as amended, relating to modifying an exception to the definition of aboveground storage tank by removing a location requirement for small devices having a capacity of 210 barrels or less, excluding points of isolation; excluding tanks not holding liquids; removing zones of critical concern; redefining release; redefining secondary containment; exempting certain tanks from level one and level two regulations for a period of one year; providing that the secretary may not require any regulated tanks in operation as of August 1, 2016, to be lifted, moved, or otherwise physically altered in connection with a visual leak detection program in the absence of a confirmed release; encouraging and promoting the use of "remote non-destructive examination technologies" in connection with any required periodic physical inspections of tanks in order to eliminate human confined spaces entries into regulated tanks; providing that emptying the contents from an aboveground storage tank shall cause the tank to become a nonoperation tank, and relieve the owner and operator of the requirements of this article, including closure requirements, until it contains liquid causing the tank to again become a regulated tank; and excepting that such tanks must continue to meet the registration requirements contained in §22-30-4 of this code, the notice requirements contained in §22-30-10 of this code, and the signage requirements contained in §22-30-11 of this code;

Be it enacted by the Legislature of West Virginia:

ARTICLE 30. THE ABOVEGROUND STORAGE TANK ACT.

§22-30-3. Definitions.

For purposes of this article:

(1) "Aboveground storage tank" or "tank" or "AST" means a device made to contain an accumulation of more than 1,320 gallons of fluids that are liquid at standard temperature and pressure, which is constructed primarily of nonearthen materials, including concrete, steel, plastic, or fiberglass reinforced plastic, which provide structural support, more than 90 percent of the

capacity of which is above the surface of the ground, and includes all ancillary pipes and dispensing systems up to, but excluding the first point of isolation. The term includes stationary devices which are permanently affixed, and mobile devices which remain in one location on a continuous basis for 365 or more days. A device meeting this definition containing hazardous waste subject to regulation under 40 C.F.R. Parts 264 and 265, exclusive of tanks subject to regulation under 40 C.F.R. §265.201 is included in this definition but is not a regulated tank. Notwithstanding any other provision of this code to the contrary, the following categories of devices are not subject to the provisions of this article:

(A) Shipping containers that are subject to state or federal laws or regulations governing the transportation of hazardous materials, including, but not limited to, railroad freight cars subject to federal regulation under the Federal Railroad Safety Act, 49 U.S.C. §20101-2015, as amended, including, but not limited to, federal regulations promulgated thereunder at 49 C.F.R. §§172, 173, or 174;

(B) Barges or boats subject to federal regulation under the United States Coast Guard, United States Department of Homeland Security, including, but not limited to, federal regulations promulgated at 33 C.F.R. 1 *et seq.* or subject to other federal law governing the transportation of hazardous materials;

(C) Swimming pools;

(D) Process vessels;

(E) Devices containing drinking water for human or animal consumption, surface water or groundwater, demineralized water, noncontact cooling water, or water stored for fire or emergency purposes;

(F) Devices containing food or food-grade materials used for human or animal consumption and regulated under the Federal Food, Drug and Cosmetic Act (21 U.S.C. §301-392);

(G) Except when located in a zone of critical concern, a device located on a farm, the contents of which are used exclusively for farm purposes and not for commercial distribution;

(H) Devices holding wastewater that is being actively treated or processed (e.g., clarifier, chlorine contact chamber, batch reactor, etc.);

(I) Empty tanks held in inventory or offered for sale, including tanks that may have been registered pursuant to this article but are not being used to store liquid;

(J) Pipeline facilities, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979, or an intrastate pipeline facility regulated by the West Virginia Public Service Commission or otherwise regulated under any state law comparable to the provisions of either the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979;

(K) Liquid traps, atmospheric and pressure vessels, or associated gathering lines related to oil or gas production and gathering operations;

(L) Electrical equipment such as transformers, circuit breakers, and voltage regulator transformers;

(M) Devices having a capacity of 210 barrels or less, containing brine water or other fluids produced in connection with hydrocarbon production activities; ~~that are not located in a zone of critical concern~~ and

(N) Devices having a capacity of 10,000 gallons or less, containing sodium chloride or calcium chloride water for roadway snow and ice pretreatment. ~~that are not located in a zone of critical concern: *Provided*, That all such devices exempted under subdivisions (M) and (N) of this subdivision must still meet the registration requirements contained in §22-30-4 of this code, the notice requirements contained in §22-30-10 of this code, and the signage requirements contained in §22-30-11 of this code~~

(2) “Department” means the West Virginia Department of Environmental Protection.

(3) “First point of isolation” means the valve, pump, dispenser, or other device or equipment on or nearest to the tank where the flow of fluids into or out of the tank may be shut off manually or where it automatically shuts off in the event of a pipe or tank failure: *Provided*, That such valve, pump, dispeanser, or other device or equipment constituting a first point of isolation is not part of the AST.

(4) “Nonoperational storage tank” means an empty aboveground storage tank in which fluids will not be deposited or from which fluids will not be dispensed ~~on or after the effective date of this article~~ because the aboveground storage tank has been temporarily or permanently taken out of service for repair, maintenance, future use, or disposal following permanent closure.

(5) “Operator” means any person in control of, or having responsibility for, the daily operation of an aboveground storage tank.

(6) “Owner” means a person who holds title to, controls, or owns an interest in an aboveground storage tank, including the owner immediately preceding the discontinuation of its use. “Owner” does not mean a person who holds an interest in a tank for financial security unless the holder has taken possession of and operated the tank.

(7) “Person”, “persons”, or “people” means any individual, trust, firm, owner, operator, corporation, or other legal entity, including the United States government, an interstate commission or other body, the state or any agency, board, bureau, office, department, or political subdivision of the state, but does not include the Department of Environmental Protection.

(8) “Process vessel” means a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process or in which a biological, chemical, or physical change in the material occurs. This does not include tanks used for storage of materials prior to their introduction into the production process or for the storage of finished products or by-products of the production process.

(9) “Public groundwater supply source” means a primary source of water supply for a public water system which is directly drawn from a well, underground stream, underground reservoir, underground mine, or other primary sources of water supplies which are found underneath the surface of the state.

(10) “Public surface water supply source” means a primary source of water supply for a public water system which is directly drawn from rivers, streams, lakes, ponds, impoundments, or other primary sources of water supplies which are found on the surface of the state.

(11) “Public surface water influenced groundwater supply source” means a source of water supply for a public water system which is directly drawn from an underground well, underground river or stream, underground reservoir, or underground mine, and the quantity and quality of the water in that underground supply source is heavily influenced, directly or indirectly, by the quantity and quality of surface water in the immediate area.

(12) “Public water system” means:

(A) Any water supply or system which regularly supplies or offers to supply water for human consumption through pipes or other constructed conveyances, if serving at least an average of 25 individuals per day for at least 60 days per year, or which has at least 15 service connections, and shall include:

(i) Any collection, treatment, storage, and distribution facilities under the control of the owner or operator of the system and used primarily in connection with the system; and

(ii) Any collection or pretreatment storage facilities not under such control which are used primarily in connection with the system.

(B) A public water system does not include a bathhouse located on coal company property solely for the use of its employees or a system which meets all of the following conditions:

(i) Consists only of distribution and storage facilities (and does not have any collection and treatment facilities);

(ii) Obtains all of its water from, but is not owned or operated by, a public water system which otherwise meets the definition;

(iii) Does not sell water to any person; and

(iv) Is not a carrier conveying passengers in interstate commerce.

(13) “Regulated level 1 aboveground storage tank” or “level 1 regulated tank” means:

(A) An AST located within a zone of critical concern, source water protection area, public surface water influenced groundwater supply source area, or any AST system designated by the secretary as a level 1 regulated tank; or

(B) An AST that contains substances defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as a “hazardous substance” (42 U.S.C. §9601(14)); or is on EPA’s Consolidated List of Chemicals Subject to the Emergency Planning and Community Right to Know Act (EPCRA), CERCLA, and §112(r) of the Clean Air Act (CAA) (known as the List of Lists) as provided by 40 C.F.R. §§355, 372, 302, and 68 in a concentration of one percent or greater, regardless of the AST’s location, except ASTs containing petroleum are not level 1 regulated tanks based solely upon containing constituents recorded on the CERCLA lists; or

(C) An AST with a capacity of 50,000 gallons or more, regardless of its contents or location.

(14) “Regulated level 2 aboveground storage tank” or “level 2 regulated tank” means an AST that is located within a zone of peripheral concern that is not a level 1 regulated tank.

(15) “Regulated aboveground storage tank” or “regulated tank” means an AST that meets the definition of a level 1 or level 2 regulated tank.

(16) “Release” means any spilling, leaking, emitting, discharging, escaping, or leaching of fluids from an aboveground storage tank, ~~into the waters of the state or escaping~~ or escaping from secondary containment into the waters of the state in a quantity that may reasonably result in more than de minimis harm to the environment, persons, or wildlife.

(17) “Secondary containment” means a safeguard applied to one or more aboveground storage tanks that prevents the discharge into the waters of the state of the entire capacity of the largest single tank and sufficient freeboard to contain precipitation. In order to qualify as secondary containment, the barrier and containment field must be sufficiently impervious to contain fluids in the event of a release, and may include double-walled tanks having a first point of isolation within five feet of the external surface of the double-walled tank, dikes, containment curbs, pits, or drainage trench enclosures that safely confine the release from a tank in a facility catchment basin or holding pond: *Provided,* That secondary containment includes aboveground storage tanks located inside structures staffed by an operator at least eight hours per day five days a week. Earthen dikes and similar containment structures must be designed and constructed to contain, for a minimum of 72 hours, fluid that escapes from a tank.

(18) “Secretary” means the Secretary of the Department of Environmental Protection, or his or her designee.

(19) “Source water protection area” for a public groundwater supply source is the area within an aquifer that supplies water to a public water supply well within a five-year time of travel and is determined by the mathematical calculation of the locations from which a drop of water placed at the edge of the protection area would theoretically take five years to reach the well.

(20) “Zone of critical concern” for a public surface water supply source and for a public surface water influenced groundwater supply source is a corridor along streams within a watershed that warrants detailed scrutiny due to its proximity to the surface water intake and the intake’s susceptibility to potential contaminants within that corridor. The zone of critical concern is determined using a mathematical model that accounts for stream flows, gradient and area topography. The length of the zone of critical concern is based on a five-hour time of travel of water in the streams to the intake. The width of the zone of critical concern is 1,000 feet measured horizontally from each bank of the principal stream and 500 feet measured horizontally from each bank of the tributaries draining into the principal stream: *Provided*, That any aboveground storage

tank located in an area designated as a zone of critical concern after January 1, 2021, shall not become a level one regulated aboveground storage tank or be subjected to the regulations related thereto for a period of one year following written notice to the owner or operator of such zone of critical concern designation.

(21) "Zone of peripheral concern" for a public surface water supply source and for a public surface water influenced groundwater supply source is a corridor along streams within a watershed that warrants scrutiny due to its proximity to the surface water intake and the intake's susceptibility to potential contaminants within that corridor. The zone of peripheral concern is determined using a mathematical model that accounts for stream flows, gradient, and area topography. The length of the zone of peripheral concern is based on an additional five-hour time of travel of water in the streams beyond the perimeter of the zone of critical concern, which creates a protection zone of 10 hours above the water intake. The width of the zone of peripheral concern is 1,000 feet measured horizontally from each bank of the principal stream and 500 feet measured horizontally from each bank of the tributaries draining into the principal stream: *Provided,* That any aboveground storage tank located in an area designated as a zone of peripheral concern on or after January 1, 2021 shall not become a level two regulated aboveground storage tank or be subject to the regulations related thereto for a period of one year following written notice to the owner or operator of such zone of peripheral concern designation.

§22-30-5. Aboveground Storage Tank Regulatory Program.

(a) The secretary shall develop a regulatory program for new and existing regulated aboveground storage tanks and secondary containment that takes into account the size, location and contents of the tanks and sets out tiered requirements for regulated tanks. Level 1 tanks shall be regulated to a higher standard of tank and secondary containment integrity based upon their proximity to a public surface water supply source or public surface water influenced groundwater supply source.

(b) The rules promulgated by the secretary for regulated tanks and secondary containment

shall, at a minimum, include the following:

(1) Criteria for the design, construction and maintenance of aboveground storage tanks;

(2) Criteria for the design, construction, maintenance or methods of secondary containment;

(3) Criteria for the design, operation, maintenance or methods of leak detection. Acceptable leak detection shall include, but not be limited to, visual inspections, an inventory control system together with tank testing, or a comparable system or method designed to identify leaks from aboveground storage tanks: *Provided*, That the secretary may not require any regulated tanks in operation as of August 1, 2016, to be lifted, moved, or otherwise physically altered in connection with a visual leak detection program in the absence of a confirmed release; in addition, the secretary shall encourage and promote the use of "remote non-destructive examination technologies" in connection with any required periodic physical inspections of tanks in order to eliminate human confined spaces entries into regulated tanks;

(4) Requirements for recordkeeping;

(5) Requirements for the development of maintenance and corrosion prevention plans;

(6) Requirements for the closure of aboveground storage tanks and any remediation necessary as a result of a confirmed release from the aboveground storage tank, using a risk based analysis: *Provided*, That emptying the contents from an aboveground storage tank shall cause the tank to become a nonoperation tank, and relieve the owner and operator of the requirements of this article, including closure requirements, until it contains liquid causing the tank to again become a regulated tank, except that such tanks must continue to meet the registration requirements contained in §22-30-4 of this code, the notice requirements contained in §22-30-10 of this code, and the signage requirements contained in §22-30-11 of this code;

(7) The assessment of a registration fee, and annual operation and response fees as determined by the secretary;

(8) Certificate to operate issuance only after the application and any other supporting

documents have been submitted, reviewed and approved by the secretary;

(9) A procedure for the administrative resolution of violations including the assessment of administrative civil penalties.

(c) For those entities that are otherwise regulated under those provisions of this chapter that necessitate individual, site-specific permits or plans that require appropriate containment and diversionary structures or equipment to prevent discharged or released materials from reaching the waters of the state, the secretary may amend those permits or plans associated with those permits or both at the request of the permittee to include conditions pertaining to the management and control of regulated tanks, so long as those conditions in the opinion of the secretary are sufficient in combination with practices and protections already in place to protect the waters of the state. In its application for permit or plan modification, the permittee shall advise the secretary whether, how and to what extent the permittee adheres to other standards or plans with regard to tank and secondary containment integrity, inspection and spill prevention and response, including, without limitation, API 653 standards for Tank Inspection, Repair, Alteration and Reconstruction or STI SP001 Standards for Aboveground Storage Tanks or the requirements of the federal spill prevention and countermeasures program governed by 40 C. F. R. Part 112. Inclusion of ASTs in amended permits or plans would not relieve the owner or operator's responsibility to pay registration, certificate to operate or Protect Our Water Fund fees. Specifically, the permits or plans the secretary may amend include:

(1) Permits issued pursuant to the Surface Coal Mining and Reclamation Act, article three of this chapter;

(2) Permits issued by the Office of Oil and Gas pursuant to article six or six-a of this chapter or spill pollution and control measures plans required under 35 C. S. R. 1;

(3) Individual permits issued pursuant to the National Pollution Discharge Elimination System, article eleven of this chapter;

(4) Permits issued pursuant to the Solid Waste Management Act, article fifteen of this

chapter; and

(5) Groundwater protection plans issued pursuant to article twelve of this chapter.

(d) Any entity whose permit or plan modification or amendment relating to tank integrity and secondary containment design operation and maintenance is approved by the secretary and so maintained shall be deemed to be compliant with this article and entitles the entity to a certificate to operate so long as the registration requirements of section four of this article are also met.

(e) The manner and time frames for implementation of the regulatory program required by this section shall be established by the secretary through the proposal of emergency or legislative rules in accordance with the provisions of article three, chapter twenty-nine-a of this code.

NOTE: purpose of this bill is to alter the definition of an aboveground storage tank.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.