

Enforcement Discretion Directive

This memorandum is written in response to industry concerns regarding the implementation of the changes to Article 17, Title 10 of the Environmental Conservation Law (ECL), specifically the changes to the definitions of petroleum, tank and facility as set forth in the ECL §17-1003. These changes to the definitions make the following tanks subject to the Petroleum Bulk Storage (PBS) regulations:

- tanks storing product for operational purposes (e.g., transformers, hydraulic machines, etc.) and
- tanks storing asphaltic emulsions.

Without this enforcement discretion memorandum these tanks are required to be registered and in compliance with 6 NYCRR Parts 613 and 614 by July 21, 2009.

As explained below, the Department has decided to exercise enforcement discretion at this time to not subject these tanks to registration and the requirements of 6 NYCRR Parts 613 and 614 until such time as the regulations are revised.

Operational Tanks

§17-1003.5 states: Petroleum means: "a. crude oil and any fraction thereof; b. any mixture containing crude oil or any fraction thereof; and c. synthetic forms of lubricating oil, dielectric oils, insulating oils, hydraulic oils and cutting oils. Such term shall not include: (1) hazardous waste defined pursuant to section 27-0903 of this chapter; (2) substances meeting the definition of hazardous substance pursuant to section 40-0105 of this chapter; (3) animal or vegetable oils that do not contain crude oil or fractions thereof; or (4) substances that are gases at standard temperature and pressure."

§17-1003.7 states "Tank" means "a stationary device designed to store petroleum, which is constructed of non-earthen materials that provide structural support. The term "tank" includes all associated pipes, lines, fixtures and other ancillary equipment. The term "tank" does not include septic tank; surface impoundment, pit, pond or lagoon; storm-water or wastewater collection system; flow-through process tank; or liquid trap or associated gathering lines directly related to oil or gas production and gathering operations."

Based on these definitions, tanks, machinery and equipment storing petroleum for operational purposes would now be subject to the requirements of the PBS regulations. Operational tanks are tanks where the product is stored but is not consumed. Examples of these operational tanks include:

- transformers,
- electrical cable oil reservoirs,
- hydraulic lift tanks and
- tanks storing hydraulic oil that are integral to a machine.

Tanks storing Asphaltic Emulsions

§17-1003.1 states, in part, "Facility" means "a single property or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located:

- a. one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum; or
- b. any tank whose capacity is greater than one hundred ten gallons that is used for the storage or containment of petroleum, the volume of which is ten percent or more beneath the surface of the ground.

This term shall not include: . . .

- (5) tanks used to store or contain asphalt, however, tanks used to store or contain asphaltic emulsions are included; . . ."

Based on the definition above, tanks storing asphaltic emulsion are specifically included as part of the facility.

Discussion

In the case of operational tanks, owners are uncertain about how to comply with the requirements of the PBS regulations given the statutory changes in 2008. Operational tanks are not constructed, operated, or maintained in the same manner as traditional storage tanks. Because of the difference in the construction and operation, it is not always practical to inspect and monitor these tanks in the same manner as traditional storage tanks. In the federal regulations for underground storage tanks (40 CFR Part 280), these operational tanks have been excluded from the regulations for three main reasons articulated by the USEPA: (1) the tanks are "self-monitoring" (significant loss of product would be accompanied by faulty operations of the equipment); (2) the contents of these tanks pose less risk to human health and the environment; and (3) leaks from these tanks are less common proportionate to other tank types. In the federal regulations for oil pollution prevention (40 CFR Part 112), EPA has set minimum standards for oil-filled operational equipment. Due to the concerns with complying with the existing requirements and the differences in the federal regulations, further review is necessary to identify appropriate standards and requirements for these tanks.

In the case of tanks storing asphaltic emulsions, owners have expressed concern as to the environmental benefit of complying with the existing requirements of the PBS regulations given the nature of the material being stored. The Department has determined after further review of the properties of some asphaltic emulsions, that the characteristics of these products are sufficiently different from the characteristics of other petroleum products to warrant additional consideration of their regulatory status. These properties render some emulsions more similar to the characteristics of asphalt which currently has some regulatory relief. Due to these issues, further review is necessary to determine the appropriate standards and requirements for these tanks.

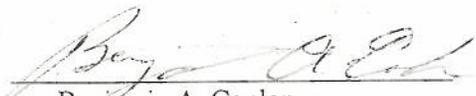
Further review of the regulatory requirements to be imposed upon both operational tanks and tanks storing asphaltic emulsions will be completed as part of the Department's ongoing rulemaking process for 6 NYCRR Parts 612-614, which will give all interested parties an opportunity to be heard.

Enforcement Discretion

The Department will exercise its discretion and not assess owners of these operational tanks and tanks storing asphaltic emulsions a violation of the Petroleum Bulk Storage regulations found at 6 NYCRR Parts 612-614 until the promulgation of updated Petroleum Bulk Storage regulations. The operational compliance concerns will be addressed during the Department's rulemaking process.

Questions regarding this matter can be directed to DERweb@gw.dec.state.ny.us.

Approved



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7/8/09
Date