



SUMMARY OF FINAL SENATE BILL 373

On Saturday evening, March 8, after intense work and consideration of perhaps 100 or more amendments, the West Virginia Legislature passed Senate Bill 373 (“SB 373”), which establishes sweeping new regulatory programs that will require registration and permitting for aboveground storage tanks (“ASTs”) and “potential sources of significant contamination” of public drinking water sources. The bill also establishes complex planning and reporting requirements for public drinking water utilities for the protection of drinking water sources. Any AST in the state, as defined below, may now be the subject of two new registration programs, two new permitting programs, several new fees, and complex design, maintenance, inspection, planning and reporting requirements. The bill is now awaiting Governor Tomblin’s signature.

One of the two new Acts included in the bill is the Aboveground Storage Tank Act, W. Va. Code §§ 22-30-1 *et seq.* This Act establishes a comprehensive regulatory program for ASTs located in the state. For purposes of the Act, AST is defined broadly to mean:

a device made to contain an accumulation of more than 1320 gallons of fluids that are liquids at standard temperature and pressure, which is constructed primarily of non-carbon materials, including wood, concrete, steel, plastic or fiberglass reinforced plastic, which provide structural support, more than 90% capacity of which is above the surface of the ground, but does not include any process vessel. The term includes stationary devices which are permanently affixed, and mobile devices which remain in one location on a continuous basis for 60 or more days, and includes all ancillary aboveground pipes and dispensing systems up to the first point of isolation and all ancillary underground pipes and dispensing systems connected to the aboveground containers to the first point of isolation . . .”

Id. § 22-30-3(1). The definition of AST goes on to exclude certain shipping containers, railroad freight cars, barges and boats. *Id.* If your AST falls within the scope of this definition, then many if not all of the remaining provisions in the Act will apply to you.

The following are some key components of this new Act:

- **Registration [§ 22-30-4]:** Under the registration program, owners and operators of ASTs must submit a registration form to the West Virginia Department of Environmental Protection (“WVDEP”) that identifies the ownership of the tank, date of installation if known, capacity and age of the tank, type and volume of fluid stored therein, and the identity of and distance to the nearest groundwater public water supply intake and/or nearest surface water downstream public water supply intake. Also, if the tank is regulated under an existing state or federal regulatory program, information about that program must be provided as well. ***As of October 1, 2014, it will be unlawful for any***

owner or operator to operate or use an AST that has not been properly registered or for which any applicable registration fee has not been paid.

- **Permitting [§ 22-30-5]:** WVDEP is to establish a new permitting program for new and existing ASTs through legislative rulemaking during the 2015 Regular Session of the Legislature. The program will include permitting procedures and extensive performance standards covering design, construction, maintenance, corrosion detection, secondary containment and leak detection. The bill also contains a limited waiver to the requirements of this section, as discussed below.
- **Other requirements:** The bill includes a number of other requirements relating to ASTs, including (a) annual inspections and certifications [§ 22-30-6], (b) evidence of financial responsibility [§ 22-30-7], (c) preparation of spill prevention response plans [§ 22-30-9], (d) notice to local governments and public water systems [§ 22-30-10], (e) tank signage [§ 22-30-11], and (f) fee assessment [§§ 22-30-12 and 22-30-13].
- **Waiver [§ 22-30-25]:** Notably, the bill includes a limited waiver of the permitting requirements in Section 5 of the article for certain categories of ASTs that either “do not represent a substantial threat of contamination” or “they are currently regulated under standards which meet or exceed the protective standards and requirements set forth in this article.” This includes, *inter alia*, (a) ASTs containing drinking water, filtered surface water, demineralized water, noncontact cooling water or water stored for fire or emergency purposes, (b) septic tanks and home aeration systems, (c) certain pipeline facilities, (d) liquid traps and associated gathering lines related to oil or gas production and gathering operations, (e) surface impoundments, pits, ponds or lagoons, and (f) ASTs for which SPCC plans are required by USEPA under 40 C.F.R. Part 112, unless the AST is located within a zone of critical concern for a public water system. WVDEP may designate through legislative rulemaking additional categories of ASTs for which the permitting requirements can be waived upon confirmation that tanks in those categories are regulated under an existing state or federal regulatory permit or standard with requirements that are at least as stringent as those set forth in this article. Finally, it should be emphasized that, as written, **the waiver only applies to the permitting requirements under section five; it would not relieve owners and operators of these ASTs of their obligations under the other sections of this article.**

The bill also creates a new statute entitled the “Public Water Supply Protection Act,” W. Va. Code §§ 22-31-1 *et seq.* The following summarizes key components of this new Act:

- This article directs WVDEP to compile an inventory of “potential sources of significant contamination” located within zones of critical concern for public water systems whose source of supply is obtained from a surface water supply source or a surface water influenced groundwater supply source. *Id.* § 22-31-4. “Potential source of significant contamination” is defined to mean “a facility or activity that store[s], uses or produces compounds with potential for significant contaminating impact if released into the source water of a public water supply.” *Id.* § 22-31-3(1)

- The Act includes a registration component, which is triggered by notification from the secretary.
- The Act authorizes WVDEP to require these sources to obtain permits, and to charge a reasonable fee to cover the cost of the new registration and permitting program. *See id.* § 22-31-4.
- The Act includes a provision ***prohibiting the use of general NPDES permits for sites with ASTs (as defined in Article 30, above) within a zone of critical concern***, and requiring existing permittees to apply for an individual permit by September 1, 2014. *See id.* § 22-31-9. The statute also would provide discretion to WVDEP to require **other** holders of general NPDES permits to obtain an individual permit if necessary to protect the public water supply. *Id.*
- The article also establishes a 12-member Public water System Supply Study Commission for the purpose of studying, *inter alia*, (a) the effectiveness of the source water protection planning process, (b) the financing and funding alternatives available for projects to create alternative/increased sources of supply for public water utilities in the event of a spill, and (c) the recommendations of the Chemical Safety and Hazard and Investigation Board relating to the Bayer CropScience incident of 2008. *Id.* § 22-31-12.

The bill also revises portions of Article 1 of Chapter 16 (Public Health) of the West Virginia Code to address regulation of public water systems, source water protection, grants for wellhead and source water protection and long-term medical monitoring. The following summarizes key components of these revisions:

- A new section regulating source water protection plans has been added, which requires public water utilities (defined as a public water system regulated by the state Public Service Commission pursuant to Chapter 24 of the state code) to submit source water protection plans to the Bureau for Public Health (“BPH”) by July 1, 2016. Requirements for source water protection plans are extensive and include (1) a contingency plan, (2) a management plan, (3) a communication plan, (4) a list of potential sources of significant contamination (provided by the WVDEP), (5) an analysis of whether the utilities’ water systems can shut intakes or otherwise have the capability for alternate water sources in the event of an emergency, and (6) an evaluation of the feasibility of implementing an early warning monitoring system. *Id.* § 16-1-9c.
- Civil and criminal penalties for violations of this article have been increased. *See id.* § 16-1-9a.
- BPH is directed to pursue federal support for and undertake a study of long-term health effect of those impacted by the January 9, 2014 chemical spill in Kanawha County. *Id.* § 16-1-9e.

Finally, the bill also amends certain provisions of the West Virginia Water Resources Protection and Management Act, W. Va. Code §§ 22-26-1 *et seq.* Specifically, the bill (1) modifies the definition of “large-quantity user” to reduce the applicability threshold from the withdrawal of “over 750,000 gallons of water in a calendar month” to withdrawal of over “300,000 gallons of water in any thirty-day period” from the state’s waters, (2) adopts the State Water Resources Management Plan, and (3) requires persons that already qualify as large-quantity users to “report actual monthly water withdrawals, or monthly water withdrawals by a method approved by the

secretary, for the previous calendar year by March 31 of the succeeding year.” Entities that qualify as “large quantity users” as a result of this bill will not need to report their water use until March 31, 2016.

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