

Environmental and Utilities Update

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AUGUST 2009

NYSDEC Exercises Enforcement Discretion for Tank Regulations

The New York State Department of Environmental Conservation (NYSDEC) recently issued an enforcement discretion memorandum regarding recent changes to the definitions of "petroleum" and "facility" under the Petroleum Bulk Storage (PBS) law (Article 17, Title 10 of the Environmental Conservation Law (ECL)). Recent changes to these definitions make tanks used to store product for operational purposes (e.g., transformers, electrical cable oil reservoirs, hydraulic equipment) and tanks used to store asphaltic emulsions subject to the PBS regulations at 6 NYCRR Parts 612, 613, and 614. NYSDEC has decided to exercise enforcement discretion and as a result, it will not subject these tanks, which would have been required to be registered and in compliance with the PBS regulations by July 21, 2009, to such registration and storage requirements at this time.

The term "facility," as defined by ECL § 17-1003.1, includes property used for a common purpose that is owned or operated by the same person and on which tanks meeting certain threshold capacities used for the storage or containment of petroleum are located. It does not include tanks used to store or contain asphalt; however, tanks used to store or contain asphaltic emulsions are specifically *included* under the definition.

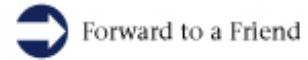
Based on the definitions of "petroleum" and "tank" under ECL §§ 17-1003.5 and 17-1003.7 respectively, tanks, machinery, and equipment storing petroleum for operational purposes (where the product is stored but is not consumed) would be subject to the requirements of the PBS regulations.

However, operational tanks are not constructed, operated, or maintained in the same way as traditional storage tanks. As such, these tanks cannot always be inspected and monitored the same way as traditional storage tanks. In the case of tanks storing asphaltic emulsions, NYSDEC has determined that the characteristics of these products are sufficiently different from the characteristics of other petroleum products to warrant additional consideration of their regulatory status. Accordingly, NYSDEC has determined that further review is necessary to determine the appropriate standards and requirements for these tanks.

Further review of the regulatory requirements for operational tanks and tanks storing asphaltic emulsions will be completed as part of NYSDEC's ongoing rule making process for 6 NYCRR Parts 612 through 614. In the meantime, NYSDEC has decided to exercise its discretion and not assess owners of these operational tanks and tanks storing asphaltic emulsions a violation of the PBS regulations until updated regulations are promulgated.

For questions regarding this or other environmental issues in New York, please contact one of the following: John A. Poakeart at (212) 451-2948 or jpoakeart@rc.com, Pamela K. Elkow at (212) 451-2943 or pelkow@rc.com, or Earl W. Phillips at (860) 275-8220 or ephillips@rc.com.

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