

Chapter 14

Post-Freedom Industries: A New Era for Aboveground Storage Tanks and Water Source Protection Laws

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§ 14.01. Introduction.

In a mere two months after a spill event in early 2014 in Charleston, West Virginia, owners and operators of aboveground storage tanks (ASTs) were faced with the challenge of understanding and complying with two

new state statutory programs aimed at ASTs and other sources of potential contamination of public drinking water sources, as well as significant revisions to other existing state statutes. The relative lightning speed with which these new programs and requirements were developed and pushed forward for implementation by the state's Department of Environmental Protection (WVDEP), Bureau for Public Health (BPH) and Public Service Commission has, and will likely continue, to pose complex challenges for the energy sector and others covered by the new laws.

Prior to the spill event, West Virginia, similar to a number of other states, regulated ASTs through a collection of existing statutes and rules.¹ Now, only six months after the spill, West Virginia's new programs are the subject of complex rule development² and are well on their way to full implementation. In the oil and gas sector alone, West Virginia's new regulatory program has been estimated to impact tens of thousands of ASTs, not to mention other "potential sources of significant contamination" of a public drinking water source. Coal sites, collectively, are not anticipated to have as many ASTs as the oil and gas sector but will have a number of ASTs associated with both surface and underground mine complexes, and may be deemed to have "potential sources of significant contamination" onsite that would be subject to further regulation. Moreover, the new statutes passed in West Virginia will add significant obligations for drinking water utilities and other regulated industries.

As demonstrated by the events of January 2014, each state is only one significant event away from the adoption of sweeping new programs to plug perceived regulatory gaps, and West Virginia's experience this year may serve as a cautionary tale for companies doing business in other states without comprehensive programs in place for ASTs. While under other circumstances a new rule or program in West Virginia may not be indicative of potential changes in other jurisdictions, the spill and subsequent national

¹ For example, federal Spill Prevention, Control and Countermeasure (SPCC) regulations, federal Emergency Planning and Community Right-to-Know Act requirements, state groundwater protection rules, spill prevention measures in the state oil and gas rules, and National Pollutant Discharge Elimination System permit requirements, among others.

² For the status of and path forward of this rulemaking process, *see* Section 14.03[1][c], below.

attention in this instance may be different. This chapter will cover the West Virginia spill event, its legislative aftermath, and how these new laws may impact energy companies and others.

§ 14.02. The Event.

On January 9, 2014, a spill of crude 4-methylcyclohexanemethanol occurred from a Freedom Industries facility to the Elk River, approximately one mile upstream of the public drinking water supply intake for West Virginia American Water's Charleston, West Virginia treatment plant. Reports over the succeeding days and weeks varied as to the precise volume, but seemed to agree that thousands of gallons of the chemical were released from a leaking AST located near the riverbank. The chemical, otherwise known as MCHM, has a strong licorice-like odor that was distinctly present throughout many parts of the Charleston area on January 9. The water treatment plant's intake was not closed as a result of the spill, and the MCHM was taken into the public drinking water system. Because the treatment system was unable to successfully remove the MCHM, the public water supply for over 300,000 residents and businesses was rendered unusable.³

The immediate impacts of the fouled treatment plant and water supply included the closure of businesses, public offices and schools, and undrinkable water for residents. The public water supply could not be used or any purpose other than flushing toilets. Replacement water was required for over 300,000 people. It took weeks to get the water system "flushed" and deemed usable again for drinking and other purposes, and months before the treatment plant's filters were replaced. The situation was unprecedented and garnered national media attention.

Fortuitously, West Virginia's regular legislative session commenced on January 8, 2014, and thus legislators, staff, and others participating in the session were in Charleston on the day of the spill and experienced first-hand

³ See, e.g., Trip Gabriel, "Thousands Without Water After Spill in West Virginia," *N.Y. Times*, Jan. 10, 2014, available at <http://www.nytimes.com/2014/01/11/us/west-virginia-chemical-spill.html>; Lenny Bernstein, "Chemical Spill into W. Va. River Spurs Closures, Run on Bottled Water," *Wash. Post*, Jan. 10, 2014, available at http://www.washingtonpost.com/national/health-science/chemical-spill-into-wva-river-spurs-closures-run-on-bottled-water/2014/01/10/a6ec518a-7a0e-11e3-b1c5-739e63e9c9a7_story.html.