

Stephanie Perdue

Attached is the Texas Industry Project Comments on Draft Guidance Document for the Aboveground Storage Vessel Safety Program, 30 Texas Administrative Code Chapter 338

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Via Electronic Submittal: <https://tceq.commentinput.com/?id=DcStB73bi>

Texas Commission on Environmental Quality
Office of Compliance and Enforcement
P.O. Box 13087 - MC 174
Austin, Texas 78711-3087
Attn: Tho Tran

Re: Texas Industry Project Comments on Draft Guidance Document for the
Aboveground Storage Vessel Safety Program, 30 Texas Administrative Code
Chapter 338

Dear Mr. Tran:

The Texas Industry Project (“TIP”) appreciates the opportunity to submit comments on the Texas Commission on Environmental Quality’s (“TCEQ”) draft guidance document (the “Guidance”) for the Aboveground Storage Vessel Safety (“ASVS”) Program, 30 Texas Administrative Code (TAC) Chapter 338 (the “Rule” or “Ch. 338”). TIP is composed of more than 50 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, transportation, and national defense industries with operations in Texas. TIP is pleased to provide the following comments in the order presented in the Guidance.

Applicability

A. Clarification on Exclusion of Allied Chemical Facilities

TIP requests that TCEQ provide additional examples of allied chemical products in the Guidance. Ch. 338 only applies to ASVs located at petrochemical plants, petroleum refineries, or bulk storage terminals. The definition of petrochemical plant excludes “a facility or chemical plant that manufactures ‘allied chemical products.’” 30 TAC § 338.2(6)(c)(i). In the Preamble, TCEQ listed “drugs, soaps, detergents, paints, and agricultural chemical formulations” as examples of allied chemical or end-user products. 48 *Tex. Reg.* 4488. TIP recommends incorporating additional examples of allied chemical products in the Guidance’s “Applicability” section and definition of “Petrochemical Plant.” Additional examples will help owner/operators determine if ASVs at their facility will be subject to Ch. 338, particularly for ASVs at multi-facility chemical plant complexes that may manufacture both petrochemical and allied products.

B. ASV Definition

TCEQ should specify that Ch. 338 only applies to storage vessels, not ancillary equipment. This clarification is consistent with TCEQ's statements in the Preamble. *See* 48 Tex. Reg. 4509 ("An ASV is defined in §338.2(1). The definition does not include ancillary equipment (such as piping, pumps, etc.)").

C. Evaluation of Non-Applicability

The Guidance does not address how TCEQ will evaluate an owner/operator's determination that an ASV is not subject to Ch. 338 under § 338.1(b) entirely or is not subject to any of the specific federal regulations and national consensus standards incorporated by reference into § 338.5 (together, "Performance Standards") based on those standards' applicability criteria. TIP requests that the Guidance include a description of when and how TCEQ will evaluate non-applicability of the ASVS Program and Performance Standards, including examples of the form and content of possible documentation (e.g., business records) TCEQ may allow.

Standards

A. Applicability Criteria for Performance Standards

TIP recommends that the introduction to the "Standards" section of the Guidance clearly state that, as provided in § 338.5(a), the statutorily-identified Performance Standards only apply to ASVs that satisfy those standards' applicability criteria. *See* Guidance at 28. As provided in TWC § 26.3442(d)-(e) and explained throughout the Rule's Preamble, the Rule is not intended to "to expand the applicability of the national consensus standards or federal statutes/regulations beyond the applicability provided in those specific standards." 48 Tex. Reg. 4490. Incorporating an explicit reference to the language of § 338.5(a) will serve this intent and assist owner/operators in determining the correct Performance Standards that apply to their ASVs.

B. Applicability of Revisions to Performance Standards After August 24, 2023

TIP requests that TCEQ clarify the applicability of revisions to the Performance Standards after August 24, 2023. For each of the Performance Standards, the Guidance includes a note explaining that the version of each Performance Standard effective as of August 24, 2023 applies, but that "[t]his does not necessarily exclude the owner and operator from meeting the requirements of later versions [and] [i]t is the responsibility of the owner and operator to make such a determination." *See, e.g.,* Guidance at 29. TIP interprets this statement to provide that owner/operators may implement a subsequent revision of a Performance Standard, as long as the revision incorporates the same or more stringent substantive requirements as those in effect as of August 24, 2023.

This interpretation would allow owner/operators some flexibility to comply with updated standards, while still ensuring compliance with specific minimum requirements identified in § 338.5. TIP understands that TWC § 26.3443(b) requires that TCEQ "shall amend through rulemaking changes if a federal law or regulation or national consensus standard is amended in a way that *materially conflicts* with the commission's current implementation of the Performance Standards for Safety at Storage Vessels Program . . ." Here, allowing an owner/operator to

implement subsequent revisions to requirements that incorporate or improve upon the requirements in place as of August 24, 2023 is consistent with TCEQ's current approach and would not "materially conflict" with the existing standards.

TIP requests that TCEQ confirm the accuracy of this interpretation and provide examples in the Guidance about the documentation an owner/operator may maintain if it chooses to utilize the flexibility of subsequent revision(s).

C. Applicability of Requirements Incorporated in Performance Standards

In the Preamble, TCEQ indicated that, in addition to the Performance Standard provisions explicitly listed in § 338.5, ASVs are also subject to requirements incorporated by reference in those Performance Standard provisions. *See* 48 Tex. Reg. 4503. TCEQ further stated that the "guidance document will provide additional clarification on which potential separate applicable standards and regulations are included in the standards incorporated by reference." *Id.* To the extent that TCEQ believes any separate regulations or standards are potentially applicable, TIP requests that TCEQ revise the Guidance to provide this additional clarification. In particular, TCEQ should identify all of the separate standards and regulations referenced in the Performance Standards that it expects owner/operators to comply with, as well as explain how compliance should be demonstrated.

D. Duplicative and Overly Burdensome Requirements

Commenters to the proposed rule noted that there is significant overlap between some of the Performance Standards, such as maintenance requirements under 40 CFR § 68.56 and API 653, process safety information requirements in 40 CFR § 68.65 and API 650 and API 653, and mechanical integrity requirements in 40 CFR § 68.73 and API 653. *See* 48 Tex. Reg. 4507-08. In response, TCEQ noted that for ASVs subject to multiple overlapping standards, "the commission's guidance document will provide guidance on how to comply with both standards without being duplicative and overly burdensome." *Id.* TIP requests that TCEQ clarify how owner/operators should comply with duplicative and overly burdensome requirements in the Guidance.

E. Descriptions of Performance Standards

Under "Standards," the Guidance describes each of the Performance Standards. TIP shares the following general comments on these descriptions.

First, TCEQ should ensure that the Performance Standard descriptions only address provisions directly related to ASVs. In TWC § 26.3442(d)-(e), the legislature explicitly provided that the standards incorporated in the Rule should "include all and only those critical safety elements that are *applicable to a storage vessel*." This directive was implemented by only incorporating regulatory or consensus standard elements/provisions relevant to ASVs in the Rule. For the 40 CFR Part 68 Chemical Accident Prevention Provisions ("RMP"), TCEQ explicitly noted that "[o]nly parts of the RMP that address ASVs are covered by this rule, not the complete site. This will be the information that the agency will be reviewing for this program. The guidance document will provide clarification on what information will need to be maintained." 48 Tex. Reg. 4505.

However, there are references to non-ASV related equipment throughout the Guidance's descriptions of RMP provisions. For example, the description of mechanical integrity requirements for Program 3 facilities under 40 CFR § 68.73 suggests that these requirements apply to process equipment other than ASVs, including: "Pressure vessels and storage tanks, Piping systems, including valves and related components, Relief and vent systems and devices, Emergency shutdown systems, Controls, including monitoring devices, sensors, alarms, and interlocks, and Pumps." Guidance at 38. Accordingly, TIP requests that TCEQ revise the Performance Standard descriptions to remove any references to requirements that do not apply to ASVs. Particular attention should be given to the Performance Standards that are not specifically limited to ASVs—RMP, 40 CFR part 112 Oil Pollution Prevention, and API Recommended Practice 2001 ("API RP 2001"). This will assist both owner/operators and TCEQ inspectors in evaluating compliance with the Rule.

Second, there is considerable variation in the level of detail of the Performance Standard descriptions. Much of TCEQ's description of RMP provisions essentially copies the relevant regulatory text verbatim, while the description of Oil Pollution Prevention provisions includes more summarization. When addressing national consensus standards, the Guidance provides high-level summaries of the standard's requirements. For example, Section 4.4.1 in API Standard 2350 is several pages long, but TCEQ summarizes this section in just one sentence. TCEQ's descriptions of Section 4.4.1-4.4.3 of API Standard 2350 are also less specific than the corresponding recordkeeping obligations identified in "Documentation Supporting Compliance" portion of the Guidance.

While variation in the descriptions is expected based on the length and nature of each Performance Standard and the Guidance suggests that the descriptions are not intended to replace review of the source material, TIP flags these discrepancies because the Guidance will inform the inspection checklist used by TCEQ to evaluate owner/operators' compliance. TIP requests that TCEQ revise the descriptions to identify the key programmatic elements of each Performance Standard that will be evaluated during inspections.

F. NFPA 30 Chapter 22 Section 8 and API RP 2001 Applicability

TIP provides the following comments concerning the applicability of National Fire Protection Association (NFPA) 30, Chapter 22 (Edition: 2021) Section 22.8: Fire Protection for Aboveground Storage Tanks and API RP2001, 10th Edition, July 2019, Sections 5, 6, 7, 8, 9, 10, 11.

First, the Guidance provides that "[i]f NFPA 30 Section 22.8 applies to an ASV, the owner/operator may choose to implement the standard or API RP 2001. All other ASVs must meet the requirements of API RP 2001." Guidance at 94. While this statement is consistent with the text of § 338.5(b)(5)-(6) and TCEQ's comments in the Preamble, it does not reflect that API RP 2001 applies only to refineries. *See, e.g.*, 48 Tex. Reg. 4493; API RP 2001, Section 1.1 ("The purpose of this recommended practice is to provide a better understanding of refinery fire protection and the steps needed to promote the safe storage, handling, and processing of petroleum and petroleum products in refineries."). Requiring ASVs located at petrochemical plants or bulk storage terminals to follow API RP 2001 would conflict with § 338.5(a)(2)'s limitation that ASVs are only subject to Performance Standards where the ASVs meet the standard's applicability criteria.

Applying API RP 2001 to ASVs at petrochemical plants or bulk storage terminals may also be inappropriate for the nature of those facilities. For example, many of the design principles discussed in API RP 2001, Section 5, “Fire Considerations in Refinery Design” would not translate to a bulk storage terminal. Bulk storage terminals also typically do not have the staffing to practically comply with Section 9, “Emergency Response Organization.” Accordingly, TCEQ should revise the text of the Guidance and the applicability flowchart for NFPA 30/API RP 2001 (Figure 6) to clarify that only refinery ASVs may be subject to API RP 2001.

Second, TIP requests that the Guidance clarify the applicability of the design principles in API RP 2001, Section 5 to existing ASVs. *See* Guidance at 96-97. Section 5.1 of this standard specifies that “the principles described [in Section 5] identify certain areas to consider during refinery design for *new construction or upgrades and expansions* (see 1.3) to help reduce the possibility of a fire and to mitigate fire damage.” The following subsections go on to describe various considerations for new construction or modifications, including Section 5.6 which addresses refinery layout and spacing. However, under § 338.5(c)(3), NFPA 30’s provision on ASV location, Section 22.4, only applies to new ASVs placed into service after September 1, 2027. To address this inconsistency, TIP requests that the Guidance describe how TCEQ expects the design principles for new construction, upgrades, or expansions in Section 5 of API RP 2001, particularly Section 5.6, apply to existing ASVs.

Waivers

The Guidance provides that an “owner or operator may also request a waiver for an ASV that was built to an alternative standard not included in Section 338.5 which would be at least as effective for public health and safety.” Guidance at 109. TIP supports the flexibility for existing vessels to comply with alternative standards based on a case-by-case review, while still advancing the Rule’s goals of protecting public health and safety.

Inspections

As written, the “Inspections” section of the Guidance provides a brief overview of what owner/operators may expect during an ASV inspection under § 338.7. *See* Guidance at 110-111. TIP recommends that TCEQ incorporate additional information regarding the scope of ASV inspections in the Guidance. In particular, the Guidance should note that, during inspections, TCEQ will focus on determining whether owner/operators have implemented all of the ASV program elements, rather than conducting a substantive review of how owner/operators have satisfied the elements. The Guidance should also specify that inspections are limited to only ASV-related information and documentation and that TCEQ will evaluate a representative sample of compliance documentation during inspections. Further discussion of what the inspection checklist used by TCEQ will include and how the checklist will be informed by the Guidance would provide additional clarity to owner/operators on the scope of ASV inspections.

TIP additionally requests that the Guidance note that on-site inspections will occur at least every five years, as provided in TWC § 26.3442(m).

Finally, the “Inspections” section of the Guidance includes some references to “investigations” and “investigators.” TIP suggests that TCEQ revise these references to “inspections” and “inspectors” to remain consistent with the Rule’s text and avoid confusion.

Recordkeeping

The Guidance states in “Recordkeeping Expectations from Owner/Operator” that records must include “documentation supporting compliance with the applicable standards” in 30 TAC 338.5, including Risk Management Program records under 40 CFR Part 68; Spill Pollution Prevention, Control, and Countermeasure (SPCC) Plan records under 40 CFR Part 112; Facility Response Plan documentation; and inspection and maintenance records for compliance with API and NFPA standards. TIP requests that the Guidance provide examples of documentation that TCEQ would view as documenting compliance with an applicable standard. Additionally, while TIP agrees that the listed documents are not intended to ensure compliance with the associated regulations, TIP suggests revising the Guidance to indicate that it is the responsibility of the owner and/or operator to maintain records to demonstrate compliance, rather than guarantee compliance, with appropriate agencies.

Registration

A. Registration Deadline for Existing ASVs

When explaining the registration deadline for existing ASVs, the Guidance states: “At the time of registration, the owner or operator must indicate which safety standards apply to the ASV and whether the ASV meets the requirements of each applicable safety standard.” Guidance at 133. This explanation should be revised to clarify that, at the time of registration, owner/operators do not have to comply with applicable Performance Standards or submit the certification affirming that compliance. Instead, compliance and certification for existing ASVs is not required until the next out-of-service maintenance event or Sept. 1, 2037, whichever comes first. *See, e.g.*, Guidance at 137.

B. Certification Status Information

In the Preamble, TCEQ noted that the Guidance would include “what information will be needed to provide certification status.” 48 Tex. Reg. 4494. While the Guidance provides helpful detail regarding the timing for certification and recertification, TIP requests that TCEQ also address the format for certification and identify what information owner/operators should consult to determine certification status.

C. Confidential Information

As written, the Guidance provides limited information regarding the confidentiality of information submitted to TCEQ via STEERS. TWC § 26.3442(l) provides that “[t]he commission shall keep confidential information reported to, obtained by, or otherwise submitted to the commission that: (1) is subject to restrictions on dissemination under federal law, including off-site consequence analysis information subject to Title 40, Part 1400, C.F.R.; or (2) may otherwise present a security risk, if disclosed publicly.” In the Preamble, TCEQ acknowledged this statutory requirement and suggested that the guidance would specify what information would not be publicly available due to homeland security or other confidentiality concerns. *See* 48 Tex. Reg.

4498, 4510. However, the Guidance only addresses the procedure for protecting the confidentiality of RMP data under 40 CFR §§ 68.151-152.

Accordingly, TIP requests that the “Registration” section of the Guidance clarify whether confidential information uploaded to STEERS for registration or certification purposes could be publicly disclosed via a Public Information Act request.

If you have any questions about these comments or would like to discuss them further, please do not hesitate to contact me at *stephanie.bergeron.perdue@BakerBotts.com* or 512.322.2544 or.

Respectfully,

A handwritten signature in black ink, appearing to read 'Stephanie Bergeron Perdue', written in a cursive style.

Stephanie Bergeron Perdue