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Executive Director

Mark Larson

Mr. Dennis Boal, Chairman
Environmental Quality Council
122 W. 25th St.
Herschler Building, Room 1714
Cheyenne, Wyoming 82002

Re: Chapter 17 Proposed Operator Training Regulations

Dear Chairman Boal,

This letter will address the April 17, 2008 “Response to Comments” document submitted to the Environmental Quality Council (EQC) by Mr. Lucht, Storage Tank Program Compliance Supervisor. Within that document the Solid and Hazardous Waste Management Division addressed comments from the regulated community regarding the proposed Chapter 17 draft regulations. Below are our responses to the department’s representation of the comment and response process.

In the Executive Summary of the Comments document, Mr. Lucht makes reference to “one issue raised where the department has not made every change requested...” The issue of Operator training indeed does remain the single most contentious remaining issue. Unfortunately, after agreeing to several minor alterations, the department dug its heels in on the issue of limiting Class B Operator facility oversight expansion to three or less facilities, a position that we intend to prove is not warranted by violation history, is not required by the EPA guidelines and imposes an unnecessary burden on the industry that will render no recognizable benefit to the citizens of Wyoming.

Since the March 18, 2008 hearing there has been a substantial amount of communication between this Association, its members and Mr. Lucht. Being new to this bureaucratic arena, the give and take of negotiating pragmatic and reasonable solutions while attempting to genuinely address the wants and needs of the department caused for what might appear to the uninformed to be a situation where, once the department agreed on one issue, this industry continued pushing for changes elsewhere. It is important for the Council to know that, while appearing to be overreaching, the requested expansions from only one facility per Class B Operator, to the request for six facilities per Class B Operator and finally the request for twelve facilities per Class B Operator were

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Terri A. Lorenzon, Director
Environmental Quality Council

driven by two factors; 1.) discussions with individuals that participated in the EPA National Stakeholder Group that developed the guidelines states were to follow and, 2.) analysis of the size and scope of the problems being mitigated relative to the intent and application of the regulations being proposed. As we worked through the process of educating each other about wants and needs, it became increasingly clear of the department's intent to exact a bureaucratic-biased standard on Operator training so high that absolutely no violations would ever be experienced again, regardless of price or imposition. This approach is costly, duplicative, heavy-handed, and simply unnecessary to accomplish the intended goals and objectives. Indeed, implementing operator training, per se, promises to eliminate many of the violations that currently frustrate the department and pose a risk of a release. To the issue that we changed positions several times as the process was ongoing simply reflects the new information we received and incorporated into the negotiations.

Having explained our rationale for the stepped increases in the number of facilities over which a Class B Operator may have oversight, please let me address specifically the several responses of the department in the Comments document.

Executive Summary: Mr. Lucht states that the "intent of the federal statute is that all three levels of operators be on-site personnel. This means that all three levels should be directly involved with the day-to-day operation of each facility."

Response: In conversation after conversation Mr. Lucht has expressed his great displeasure that the EPA is not implementing the plain language of the statute. In several places in the Comments document, Mr. Lucht acknowledges the lack of clear direction from the guidelines:

- Page 2 – "The federal standards in this case are not entirely clear."
- Page 3 – "Federal guidelines are silent about how a state must implement these training requirements."
- Page 3 – "Since the federal guidelines are so broad, it would be hard to state exactly where a state is more or less stringent."

Further, the department's interpretation that all three classes of operators literally must be present in a facility is not maintained in their own proposed regulation. In the proposed regulations, Class A Operators may have oversight for up to 15 facilities. How does the department explain this deviation from its own interpretation of the statute...other than they "reluctantly" made the change (page 10, Response 15)? Also, in the final draft, Class B Operators may have oversight for up to 3 facilities. At one point in our negotiations, Mr. Lucht's was contemplating and indeed offered verbally to allow Class B Operators to have oversight for up to 6 facilities as long as there were at first, twice weekly inspections, and then later, monthly inspections. The department's final decision was to stick with the 3-facility oversight regulation, thus straying from its own interpretation.

In our letter dated March 27, we pointed out that the EPA guidelines specifically authorize a Class B Operator as follows: "A Class B Operator implements applicable underground storage tank regulatory requirements and standards **in the field**. This

individual implements day-to-day aspects of operating, maintaining and recordkeeping for underground storage tanks at **one or more facilities.**” [emphasis added] Clearly, the department’s literal interpretation of the statute does not agree with the EPA guidelines.

It is very important to point out here that the State of Colorado went through a similar process of regulation development as required by the EPA. Colorado’s proposed regulations place NO limitations on the number of facilities over which a Class A or Class B Operator may have oversight...but did require that a Class B Operator must perform an inspection of every facility every month.

Finally, it is our contention that historical violation data indicate that limiting Class B Operators to any limit on facilities over which they may have oversight is not warranted. In our final recommendation to the department we requested that a Class B Operator be allowed to oversee up to 12 facilities as long as every facility had a Class B Operator perform an inspection of every facility every month. We also offered to raise the training standard for Class C Operators to include those issues we understood Mr. Lucht to have concerns with. We established the 12 facility number as a threshold simply because we recognized Mr. Lucht was not going to allow unlimited oversight and drew a line between small operations and large operations (page 9 in the Comments document). According to Mr. Lucht’s chart the clear delineation is between operators with 12 or less facilities with the next smallest operator having 22 facilities.

The April 9, 2008 document Mr. Lucht sent to the Association at our request, references some of the gross violators and the significant penalties that were assessed for those violations. I requested that Mr. Lucht provide me with examples of violation quantities and severity so that I could understand the department’s rationale for being so strict on Class B Operator oversight. What I found was that the overwhelming majority of violations were automatic tank gauging (ATG), failure to report suspected releases (resulting from ATG failure), failure to perform inventory controls and maintenance of records. Naturally there were other violations relative to operations and equipment but the vast majority was as referenced above.

Our review of the violations data in this letter indicate that with the new Class A and Class B Operator training and testing requirements (which we agree with) that operators will not longer be ignorant of the regulations and procedures. Please keep in mind here that the EPA (as Mr. Lucht asserts on page 5 under Response 5) recognized the need for this training and as a result, Class A and Class B ICC-tested Operators would be monitoring every facility. Add to those improvements the Class C Operator training (which we have strengthened through our recommendations and are open for others) and I would submit to the Council that a vast majority of these violations would disappear altogether.

CWPMA does not understand why the department places so little value on the significance of the combined effectiveness of the EPA regulations that they still insist on a Class B Operator having oversight over only three or fewer facilities. With the significant differences between the Wyoming proposal and proposals from other states

with no Class B Operator limitations (provided that monthly inspections are required), it is difficult to understand why the department cannot adopt the 12 facility oversight limit, add the monthly Class B Operator inspection for every facility every month and enhance Class C Operator training to address the repetitive violations. If the above recommendations do not significantly improve and reduce violations previously experienced with NO required testing or training, then perhaps the rule should then be altered. We have no doubt that the department will still experience vast improvements in violation reductions if the industry recommendations are adopted.

Response 3: CWPMA challenged the department on W.S. 35-11-1416(a) because the original proposal had four levels for training while the EPA only requires three. The department originally required Level 1, Level 2, Level 3 and “service station clerks” testing and/or training. It was our assertion that the EPA only required three levels of Operator training and suggested that the original draft exceeded federal standard. Mr. Lucht agreed and made the changes.

Response 3: In the departments defense of our “more stringent than federal standards” challenge, the department referenced its “cardinal principals” when considering federal mandates. Item 2 of the principals states, “Whatever we do should be fair to everyone. Large operators should enjoy no competitive advantage simply by virtue of their size, and no one should be exempted simply because they are too small.” CWPMA wholeheartedly endorses this principal in context. However, we completely disagree with the implication that just because EPA guidelines require, “Each underground storage tank system or group of underground storage tank systems at a facility must have a Class A, Class B, and Class C operator designated,” that it would be “unfair” or a “competitive advantage” allowing larger operators to utilize Class A and Class B Operators over more than one facility. Indeed, smaller operators under the law may satisfy multiple operator positions. In a single store operation, all three classes of operator are likely to be one individual. We believe the regulations make allowance sufficient to offset unfairness concerns.

CWPMA questions if it is the place of government to guarantee competitive equity when it comes to regulatory agencies...especially when applying that standard would place the department at risk of over reaching the intended regulations (being more stringent)...as we sincerely feel the department is doing on limiting Class B Operator facility oversight. Where is the fairness in requiring a marketer with 5 facilities in close proximity (like Cheyenne) to have 5 Class A and 5 Class B Operators when the regulations clearly allow multiple facility oversight? The focus of the department should not be on promulgating socialized competitive nuances while implementing federal regulatory mandates. Rather the department’s focus should be on creating the least restrictive environment for private industry as a whole while satisfying the intent of the law. Indeed, the department’s application of fairness in this sense borders on reverse discrimination, restraint of trade, unfunded mandates and a host of other governmental interference maladies. While CWPMA applauds the notion of fairness, we feel it is significantly over-reaching to apply this standard when not addressed in the law.

CWPMA also rejects the cost analysis attempted by the department. Since the department rejects requests for in-house and possibly Internet testing, we do not feel it is the departments place to attempt to justify its decision based on *its* interpretation of what is reasonable to small business and what is not.

Response 4: The department asserts that it drafted the rules after much discussion with owners and operators of storage tanks. In actuality, Mr. Lucht drafted the rules with no collaboration and then sent them out for “comment.” When this Association requested minutes from any rules-drafting meetings along with a list of attendees, it was discovered that none were kept. While the department did maintain a list of all comments and addressed those comments on paper, every other state that I am aware of took the EPA guidelines to heart and actually worked through drafting of the regulations with industry at the table. The department claims that EPA guidelines did not require CWPMA to write the rules. We agree. However, we must point out that the guidelines call for states to assure the regulations “are developed in cooperation with tank owners and operators.” We contend that the department failed in its approach to drafting the proposed regulations as compared to other states and genuine EPA intent. In my discussions with participants of the so-called “cooperative process”, I learned that the process was driven by the department with little genuine outreach and/or true collaboration. Being new to the state of Wyoming administrative process, I find the departments claims of adequacy to fall significantly short by customer analysis. Collecting comments and addressing them with multi-page responses does not a collaborative process make.

The outreach the department performed regarding the test development was thought adequate and CWPMA thanks the department for that due diligence. Unfortunately, while the department claims in the paragraph addressing test development (page 4) that the department did “more than the minimum in involving industry in the promulgation process for the rules,” the subsequent disclaimer paragraph resulted from tank owners and operators pointing out that they ONLY participated in the test development process, not the rules development process. Again, CWPMA does not have issues with the requirement of testing or how the tests were developed. We definitely find fault with the rules development process and felt it was simply a superficial precursory effort.

Mr. Lucht made a comment before the EQC March 18, 2008 meeting that he was surprised at my testimony and that he was not aware of any significant objections to the proposed Operator training. Mr. Lucht further stated to me that all of the “chain operators” were already sending employees to training and did not appear to be in disagreement with the regulations. I since have contacted the three largest operators (two of which are not members of the Association) in the state and found this not to be the case. Accordingly, those operators will be addressing the DEQ under separate cover.

Response 5: CWPMA finds it interesting in this Response that the department would confirm that training was never required, only implied. The department points out that congress was justified in passing this law. We agree. We know of no industry that recognizes “implied requirements.” Now that congress passed the law and the EPA has promulgated Operator training, we feel the combined effects of Class A, Class B and

Class C operators will greatly improve operational compliance. “Implied” regulations never work.

To that end, the April 9, 2008 letter from Mr. Lucht to CWPMA referencing violations states, “The violations cited in those documents were all violations that should not have occurred if the on-site operator had understood the requirements of the program.” We wholeheartedly agree! With the required testing and with the multiple improvements in monitoring and oversight, we are confident most of the violations in this document will not be repeated. Again, we do not disagree with the testing and the three levels of Operator training. We simply believe that the department’s requirement that Class B Operators have oversight only over 3 or less facilities is overkill and ignores the significant benefit that combining a Class A operator with heightened Class C Operator training will provide.

Response 6: The department references one of the EPA guidelines where the “states must consider the high turnover rate of employees in this industry.” Unfortunately, they limited their consideration on this requirement only to service station clerks. Nowhere in the EPA guidelines does it state that turnover is only relevant to service station clerks. The department inaccurately assumes that just because a so-called “manager” position is “higher up” than the service station clerk, that there are any fewer turnovers of managers. It would have been nice to have this discussion in the “collaborate discussions with tank owners and operators.”

Further, the “loophole” acknowledged in Response 6 is a very real concern. The department dismisses the loophole as “unfortunate.” We submit that with our proposed required inspection by a Class B Operator of every station, every month will eliminate the “loophole.” Had the department focused on solutions instead of attempting to justify how much revenue a manager may be responsible for or how easy the “open book test” is (dismissing the fact that it may be 200 miles to the nearest testing location) and all the other qualifying of what is too much to ask of tank owners or operators, perhaps we could have explored solutions together.... openly, candidly and with genuine intent. We can close the loophole by adopting the CWPMA suggested revisions.

Responses 13 through 13h: As discussed in the opening comments of this document, the process of attempting to seek workable and effective solutions also sponsored a heightened understanding of what was actually needed to reach the desired goal of compliance and release elimination. Midway through that process, I requested that tank owners and operators submit letters to Mr. Lucht seeking to reach compromise on Class B Operator facility oversight limitations, etc. Those letters (as I instructed members to request) sought a 6-facility oversight threshold. Mr. Lucht tentatively agreed but came back with the provision that the Class B Operator must visit every facility twice weekly. At the same time this discussion was taking place (and after the letters were written), Colorado finalized its proposed regulations and in those regulations (that were genuinely worked through with tank owners and operators), there were no limitations placed on Class B Operators... as long as the monthly inspection was preformed. Almost simultaneous, discussions with participants of the EPA National Stakeholder Group

demonstrated that the Wyoming proposed regulations were not in sync with the EPA National Stakeholder Groups discussions and/or recommendations. Accordingly, we retracted our 6-facility position and proposed the 12-facility recommendation...again only because we recognized that the department would never agree to unlimited Class A and Class B oversight.

To this point, I requested Mr. Mark Morgan, Esq., Regulatory Counsel for the Petroleum Marketers Association of America and participant in the National Stakeholder Group that developed definitions and identified responsibilities for operator training with the U.S. EPA, to submit a letter explaining what the intent of the regulations are (letter attached.) Mr. Morgan states several things:

- “The Class B operator is usually a general manager of company wide c-store operations having daily responsibility for the operation and maintenance of underground storage tank systems.”
- “The group also acknowledged that in smaller companies, it is not unusual for the Class A and Class B operators to be the same person. In a single operation, all three classes are likely to be one individual.”
- “I can say clearly and unequivocally that it was not the intent of the group to require Class B operators to make multiple weekly visits to each UST site. This would have been considered unnecessary and overly burdensome.”
- “Requiring multiple on-site weekly visits by the B operator is precisely the kind of overly burdensome and inflexible approach that Congress, the EPA and the stakeholder group intended to avoid.”
- “I do not believe that the proposed Wyoming operator training requirements reflect the degree of flexibility or recognition intended by the Act of the EPA guidelines.”

As a result of the Colorado proposal, discussions with Counselor Morgan, as well as discussions with my colleagues around the country, it was determined that 6 facilities for Class B Operator oversight was simply too low. We request that the Council disregard the previously submitted operator letters. As Executive Director of the Association that represents every letter submitter, I have been authorized to speak on each of their behalf. We appreciate the Council’s understanding of this nuance as the department has attempted to portray this change in position negatively.

Regarding the departments assertion that “on-site” is repeated multiple times through the guidance document when addressing all three levels of Operator, how is it then that the department is itself proposing 15 facility oversight for a Class A Operator and up to 3 facility oversight for a Class B Operator? I must be blunt here and state that if Mr. Lucht was forthright with the EQC, as he was in the March 18th meeting and has been with me personally, he would back off the department steadfast assertion that “on-site” is strictly construed as I know he has had many discussions with colleagues and administrators who know that the EPA guidelines do not match his interpretation. We are fearful that at this juncture in the process and even with the Morgan letter in hand, that Mr. Lucht’s position

has been adhered to for so long that no amount of evidence or factual information will change the department's position.

Finally on *Response 13*, the department again makes the plea that it would be unjust to allow chain stores to gain a "competitive advantage" over smaller counterparts if the CWPMA proposed revision of 12-facility oversight for a Class B Operator were adopted. I believe we adequately addressed this issue in the second *Response 3* on pages 3 and 4. Single store operations may have one individual fulfill all three classes of operator.

Response 14: The department changed the "Service Station Clerks" designation to "Class C Operators (Service Station Clerks). We acknowledge that some Class C Operators will indeed be "Service Station Clerks" but some Class C Operators may be managers as well. Indeed, Mr. Lucht's violations letter of April 9, 2008 seemed to understand this nuance when he stated, "The Class C Operator is a service station clerk, who is not usually in charge of the station." Many times the Class C Operator will be the person in charge. Accordingly, we have proposed enhanced training for these operators to assure their handling of emergencies and other regulation recognition issues are maximized. We could argue the semantics of this language ("Service Station Clerks") remaining in the Operator C title but will rather focus on the importance that this position has in the combined effectiveness of the Operator training intent. CWPMA has suggested additional training requirements for a Class C Operator in recognition of the departments concerns surrounding deliveries, equipment recognition and function, and alarm recognition. After review of the April 9, 2008 violations letter Mr. Lucht made available for our review, CWPMA would also like to recommend adding tank gauging training to the training requirements since the vast majority of violations seemed to surround ATG violations. We are also open to any other training additions that might assist these employees "having primary responsibility for addressing emergencies" (EPA guidelines) and have related the same to Mr. Lucht.

Response 17: The department's statement that "there is really no basis in fact for CWPMA's position on this issue" is troubling. We contend and many states agree, that the Class A Operator is the owner or regional manager in an organization. The EPA guidelines state that a Class A Operator "has primary responsibility to operate and maintain the underground storage tank system. The Class A operator's responsibilities include managing resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements. In general, this individual focuses on the broader aspects of the statutory and regulatory requirements and standards necessary to operate and maintain the underground storage tank system." Clearly, this is the highest level in the "food chain" of responsibility, including owners.

A Class B Operator, according to the EPA guidelines, "implements applicable underground storage tank regulatory requirements and standards **in the field**. This individual implements day-to-day aspects of operating, maintaining, and recordkeeping for underground storage tanks at **one or more facilities**." [emphasis added] Clearly this person is *in the field over one or more facilities* as intended by the EPA. The departments statement that "A Class B Operator is not a mid-level manager, but rather the person on

the site at least 5 or 6 days a week” simply is not supported anywhere in the EPA guidelines. Please ask the department where they observed the “5 or 6 days a week” interpretation. The plain language of “in the field” and “at one or more facilities” does not support the department’s interpretation.

Having said the above, one only needs to read the Morgan letter to resolve this issue.

Summary: This issue before the Environmental Quality Council, in our opinion, boils down to how many facilities a Class A or Class B Operator may have oversight over as intended by the EPA guidelines sufficient to meet the historical violation needs of the state of Wyoming. We agree that the regulations are needed and endorse their implementation. Our goal is in sync with the EPA’s goal... ‘a focus on preventing releases.’ We genuinely understand the need to be good stewards of our environment.

In our final letter to the department dated April 11, 2008, CWPMA suggested revisions to the proposed regulations as follows:

- Allow Class B Operators to have oversight for up to 12 facilities.
- Require that every facility is inspected by a Class B Operator every month w/documentation.
- Add to the currently proposed Class C Operator training requirements:
 - A thorough understanding of delivery procedures and hazards.
 - The ability to recognize and differentiate between alarm systems and understand the significance each alarm represents.
 - The location and function of leak detection and cathodic protection devices and systems.

We developed these revisions after hours of discussions between Mr. Lucht and me. We developed these revisions from a historical perspective of violations experienced in concert with the departments stated concerns. We developed these revisions utilizing our own experience and understanding of operational norms while remaining focused on outcome expectations. We honestly feel that the above recommendations represent a balanced compromise between satisfying departmental concerns while also addressing operator operational realities...all the time with a focus on preventing releases.

If we were to be asked if we felt the compromise to 12 facilities Class B Operator oversight was still a significant limitation, we would have to say, “yes”. However, we understand the department’s position as well and know that with effective compromise there must be some give and take. To that end, we respectfully request that the Council accept the above recommendations. In the final analysis, if after a year or two of experience this compromise proves to be ineffective, the department may certainly change the regulations. On the other hand, if significant improvements in compliance are enjoyed, then perhaps the industry can come back for expansion of the oversight limitations.

The Colorado Wyoming Petroleum Marketers Association thanks you for your time and consideration on this important matter. We recognize that this has been an arduous and lengthy process. CWPMA is a firm believer that the system does work when citizens and government work together for pragmatic and effective solutions. Thank you again and we look forward to the dialogue at the May 29, 2008 meeting in Casper. It promises to be a well-attended event.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Larson', with a long horizontal flourish extending to the right.

Mark Larson
Executive Director