

Secretary's Order No.: 2010-A-0015

**RE: Approving Final Amendments to 7 DE Admin. Code 1351,
Delaware Regulations Governing Underground Storage Tank Systems**

Date of Issuance: May 18, 2010

Effective Date of the Amendment: June 11, 2010

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulatory amendments to 7 DE Admin. Code 1351, Delaware Regulations Governing Underground Storage Tank Systems ("UST Regulations"). The Department's Tank Management Branch of the Division of Air and Waste Management (DAWM) commenced the regulatory development process with Start Action Notices 2008-20 and 2008-23. The Department initially published the proposed regulatory amendments in the April 1, 2009 *Delaware Register of Regulations* and held a public hearing on April 21, 2009. The public hearing record remained open at that time for public comment through April 30, 2009. Subsequent to the public hearing held on April 21, 2009, but prior to April 30, 2009, the Department received voluminous substantive formal comment from the U.S. Environmental Protection Agency ("EPA") regarding these proposed amendments, such that *substantive* revisions to the same were necessary in order to comply with federal requirements as set forth by the EPA. As a result, the Department significantly revised its proposed amendments to 7 DE Admin.

Code 1351 over the next several months, in order to fully incorporate all requisite federal requirements, clarify language where needed, and help ensure continued protection of human health, safety and the environment. The Department published its *revised* proposed regulatory amendments in the December 1, 2009 *Delaware Register of Regulations* and held a second public hearing on January 12, 2010. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated April 28, 2010 (Report). The Report recommends certain findings and the adoption of the proposed *revised* Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the *revised* proposed Amendments are well-supported by the record developed by the Department, and I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed *revised* Amendments. Throughout the lengthy regulatory development process regarding this promulgation, the Department received public comment from the regulated community, as noted in the Report, and the same were fully addressed by Department staff in a thorough and balanced manner, accurately reflecting the information as contained in the public hearing record which was developed in this matter.

I find that the Department's experts in the Tank Management Branch of the DAWM fully developed the record to support adoption of these *revised* Amendments. With the adoption of this Order, Delaware will incorporate all requisite federal requirements for its tank operator training program, as required by the Federal Energy Policy Act of 2005, as well as incorporate new requirements prohibiting installation of new underground storage tanks within specific distances of public, industrial, and

domestic wells, to make the UST Regulations consistent with analogous requirements in DNREC Division of Water Resources Regulations, thus ensuring protection of drinking water supplies. Additionally, and specifically as a result of the public comment received by the Department in this matter, language clarifications have been made to specific sections of these regulations, in order to promote a greater understanding of the same to the regulated community here in Delaware. Lastly, corrections and additions are being made to Delaware's UST Regulations in order to (1) conform to the federal requirement that state regulations are at least as stringent as the federal underground storage tank regulations; and (2) correct numerous clerical errors discovered in the last edition of these regulations, which were previously issued on January 11, 2008.

In conclusion, the following findings and conclusions are entered:

1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these *revised* proposed Amendments as final;

2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on both the initial proposed Amendments, as well as the proposed *revised* Amendments, including at the public hearings held on April 21, 2009 and again on January 12, 2010, respectively;

3.) The Department held public hearings, initially on April 21, 2009, and then again on January 12, 2010 (on the proposed *revised* Amendments), in order to consider public comments before making any final decision;

4) The Department's Hearing Officer's Report, including its recommended record and the recommended *revised* Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended *revised* Amendments do not reflect any substantive changes from the proposed *revised* Amendments as published in the December 1, 2009, *Delaware Register of Regulations*;

6.) The recommended *revised* Amendments should be adopted as final regulation Amendments because (1) Delaware will be able to incorporate federal requirements for a Tank Operator training program as required by the Federal Energy Policy Act of 2005; (2) requirements prohibiting installation of new underground storage tanks within specific distances of public, industrial and domestic wells will provide consistency with analogous DNREC Division of Water Resources Regulations to ensure protection of drinking water supplies; (3) clarifications made to specific sections of these regulations in response to public comment received will promote a greater understanding of said regulations for the regulated community; (4) clerical errors found in the previous edition of these regulations will be corrected; (5) Delaware's state regulations will be made at least as stringent as the federal underground storage tank regulations; (6) the amendments are well supported by documents in the record; and that

7.) The Department shall submit this Order approving the final regulation to the *Delaware Register of Regulations* for publication in its next available issue, and

provide such other notice as the law and regulation require and the Department determines is appropriate.

/s/Collin P. O'Mara
Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Approving Final Delaware Regulatory Amendments to
7 DE Admin. Code 1351: Delaware Regulations Governing
Underground Storage Tank Systems**

DATE: April 28, 2010

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday, January 12, 2010, at 6:00 p.m. at the Department of Natural Resources and Environmental Control ("DNREC", "Department"), 391 Lukens Drive, New Castle, Delaware to receive comment on proposed regulatory amendments ("amendments") to 7 DE Admin. Code 1351, *Delaware Regulations Governing Underground Tank Systems* ("UST Regulations"). The Delaware UST Regulations were first effective July 11, 1986. The most recent revision date is January 11, 2008.

The Department is proposing revisions to the current UST Regulations to (1) incorporate federal requirements for a tank operator training program as required by the Federal Energy Policy Act of 2005 ("EPACT"); (2) establish additional requirements prohibiting the installation of new underground storage tanks ("UST") within specific distances of public, industrial and domestic wells to provide consistency with analogous DNREC Division of Water Resources Regulations to ensure protection of drinking water

supplies; (3) add clarifying language to the current UST Regulations in direct response to public comment requesting such, in order to promote a greater understanding of these regulations to the regulated community; (4) incorporate both corrections and additions to the current UST Regulations to conform to the Federal requirement that State regulations are at least as stringent as the Federal UST Regulations; and (5) make corrections to clerical errors contained in the January 11, 2008 edition of the UST Regulations.

It should be noted that the *initial* public hearing held by the Department in this matter was on April 21, 2009. At that time, the record for public comment to be received by the Department was open through close of business on April 30, 2009. Subsequent to the date of that public hearing, but prior to the close of the hearing record with regard to public comment on April 30, 2009, a voluminous amount of substantive comment was received by the Department, most notably from the United States Environmental Protection Agency (“EPA”). Much of the comment from EPA necessitated the Department to draft *substantive* changes to its proposed revisions to Delaware’s UST Regulations. Thus, the Department revisited its initial draft proposed amendments to Delaware’s UST Regulations, incorporated EPA’s comments into the same, re-published the proposed *revised* amendments to Delaware’s UST Regulations in the December 1, 2009 edition of the *Delaware Register of Regulations*, and held a second public hearing regarding this proposed promulgation on January 12, 2010, as noted above.

The Department has the statutory basis and legal authority to act with regard to the proposed *revised* amendments to 7 DE Admin. Code 1351, *Delaware Regulations Governing Underground Storage Tank Systems*, pursuant to 7 Del. C., Chapter 60, 7

Del.C. Chapter 74 (Underground Storage Tank Act), and the Federal Energy Policy Act of 2005, Title XV, Subtitle B.

Comment was received by the Department regarding this proposed promulgation, and the same will be discussed in detail below¹. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record consists of the following documents: (1) a verbatim transcript and seven documents introduced at the public hearing held on April 21, 2009, and marked by this Hearing Officer accordingly as Department Exhibits 1-7; and (2) a verbatim transcript and nine additional documents introduced at the public hearing held on January 12, 2010, and marked by this Hearing Officer accordingly as Department Exhibits 1-9. The Department's person primarily responsible for the drafting and overall promulgation of these proposed regulatory amendments, Jill Williams Hall, developed the record with the relevant documents in the Department's files.

Following the submission of the Department's exhibits into the record at the hearing held on January 12, 2010, Ms. Hall proceeded to offer a brief summary as to the history of UST management in Delaware, and the purposes behind the present proposed promulgation. As noted above, the purpose of this action is to revise Delaware's current *Regulations Governing Underground Storage Tank Systems* to reflect federal requirements, specifically, from the federal Energy Policy Act of 2005 (EPACT), which requires that regulations be promulgated at the state level for a Tank Operator training

¹ The public hearing record remained open for receipt of public comment initially from April 1, 2009 through April 30, 2009, at which time the record closed with regard to receipt of further public comment. Upon the Department revising the proposed amendments and publishing the same in the *Delaware Register of Regulations* on Dec. 1, 2009, the record was re-opened for the receipt of public comment with regard to the *revised* proposed amendments, beginning December 1, 2009, and was held open through close of business on Friday, January 22, 2010. The record was held open by this Hearing Officer for an additional 10 days subsequent to the date of the

program. Additional requirements prohibiting the installation of new USTs within specific distances of public, industrial, and domestic wells are being proposed by the Department at this time as well, to provide consistency with analogous DNREC Division of Water Resources Regulations, to ensure protection of Delaware's drinking water supplies. Moreover, corrections and additions were made to Delaware's UST Regulations in order to conform to the federal requirement that state regulations are at least as stringent as the federal UST Regulations. Also, in response to public comment requiring such, clarifying language was added to specific sections of the proposed amendments, in order to promote a greater understanding of these UST Regulations within the regulated community here in Delaware. Lastly, corrections were made to clerical errors as contained within the January 11, 2008 edition of Delaware's UST Regulations.

Although the most recent revision of the UST Regulations was promulgated in early 2008, the amount of revision being made at this time is quite voluminous in nature. Most notably, in addition to the clarifying language and clerical corrections being made in this matter, there are the additions of (1) a new tank operator training program and (2) new location requirements for new underground storage tank installation, both of which the Department is proposing at this time.

With regard to the new tank operator training program, the federal Energy Policy Act of 2005 requires that states develop and enforce a training program for all UST operators. There are definitions for Class A, B, and C operators, which are taken directly from the EPACT requirements. While the course curriculum has not yet been fully

second public hearing (held on January 12, 2010) in order to allow the Department the opportunity to respond to public comment received at that time.

developed and finalized, federal law mandates that the same must include training on registration and notification, operation and maintenance, emergency response, compatibility of regulated substances, financial responsibility, routine inspection, release reporting, and materials. Class C operators are trained just on emergency response, and can be trained by the Class A and/or B operator. Class A and Class B operators will be required to take an actual training class. There will be reciprocity with other state operator training programs. Individuals who have been designated as Class A or Class B operators in another state do not have to attend the DNREC training, however, they will have to successfully complete a DNREC Assessment test. Retraining will not be required, unless DNREC notes significant violations. If, by federal law, any of the following violations are noted, there must be some level of retraining: spill and overfill prevention; cathodic protection systems properly maintained, operated and tested; financial responsibility current; tank and piping release detection present and functional; and that testing has been done in compliance with Delaware UST Regulations.

The dates for compliance with this new tank operator training program are no later than August 8, 2012. In response to public comment concerning the ability of operators to be able to comply with this new compliance requirement, the Department's *revised* proposed amendments include that DNREC will "...ensure that Department approved training will be available beginning August 1, 2010, and shall ensure that Department approved training is available at a minimum of once every forty-five (45) days)." Currently, Delaware Technical and Community College ("DTCC") is under contract to develop the curriculum for the operator training program. DNREC is working with DTCC on the logistics of this course offering. It is anticipated that, due to DTCC

having campuses in all three counties of Delaware, such courses will be offered in all three counties of this State.

With regard to the incorporation of new requirements for the location of new underground storage tanks in the proximity of public, industrial or domestic wells, the Department is proposing that any new tank must be a minimum of 150 feet from a public or industrial well, and that any new tank must be outside of the distance of a 100-foot radius from a domestic well. This new requirement mirrors the *Delaware Regulations Governing the Construction and Use of Water Wells*, which require that a new well be those distances from an underground storage tank. The Department has included in its proposed amendments a firm definition of domestic well, industrial well and public well, which again mirror the existing definitions as found in the *Delaware Regulations Governing the Construction and Use of Water Wells*. If the minimum distance requirement cannot be met, then a request for approval of a lesser distance must be made in writing to the DNREC Tank Management Branch. Of course, the Department notes that there are local ordinances in effect in New Castle, Kent and Sussex counties, as well as various local municipalities, which may be more stringent than those requirements proposed by the Department in this matter. Thus, Ms. Hall noted at the initial public hearing that the Department cautions the public to always check the applicable local ordinances with regard to such distance requirements governing the construction of these types of wells.

At the time of the second public hearing held on January 12, 2010, Ms. Hall highlighted the substantive changes that were made as a result of the public comment that had been received subsequent to the *initial* publication of the Department's proposed

amendments in April of 2009. It should be noted that the Department added “wastewater treatment tanks” to the list as contained in Part A with regard to those tanks not subject to the UST Regulations, with the exception of the requirement for interim prohibition, which is that they be protected against corrosion, and follow all remediation requirements. This is a federal requirement only for wastewater treatment tanks not covered under the Clean Water Act.

Ms. Hall noted that the Department has noted consistent confusion with regard to two different categories of heating fuel underground storage tanks, one being “consumptive use” on the premises where such tanks are stored, and the other being tanks for “non-consumptive” use. Ms. Hall explained that, typically, most tanks fall under the “consumptive use” category, and are subject to “Part C, Operation & Maintenance Requirements”. If tanks store heating fuel and are for non-consumptive use on the premises, they would be subject to “Part B, Operation & Maintenance Requirements”, which in turn then makes them subject to Part “F”. All heating fuel tanks are always subject to any of the remediation requirements. Thus, the Department added clarifying language to the proposed *revised* amendments to help clear up this noted confusion.

Clarifying language was also added with regard to “Consumptive Use Heating Fuel Underground Storage Tanks registration fees, to wit: those Heating Fuel USTs that are greater than 1,100 gallons and less than or equal to 2,000 gallons pay fees from January 1, 1989 to May 14, 1993, pursuant to when Part “C” was initially promulgated by the Department. Said Heating Fuel tanks which are greater than 2,000 gallons have paid fees from January 1989 through the present, and Ms. Hall noted in her presentation that this scenario has always been the case. However, for the sake of promoting greater

clarity with regard to this matter, additional language was added by the Department to make this issue abundantly clear. Additionally, to be as stringent as the federal regulations, throughout Parts “B”, “C” and “D”, anywhere where the UST Regulations state there are requirements for release detection, the Department has added that release detection options must be operated at least once every thirty (30) calendar days.

In the initial proposed amendments to the UST Regulations, the Department had added a section that did not require a link leak detector if continuous interstitial monitoring was installed in the piping containment sump. However, one of the comments received from the EPA is that this proposal would not be approved by that agency. Thus, the Department has struck that added section from the proposed *revised* amendments at this time. Clarifying language was also added to the Manual Tank Gauging Requirements, again, based upon comments received from EPA. The *revised* amendments now state that stick readings must be an average of *two* consecutive readings (instead of one), and the initial amendment indicating a change in “monthly tank volume” is now actually an “average of the four most recent changes in tank volume”.

Additional clarifying language was incorporated into the requirement that water had to be removed from Used Oil USTs within seven (7) days. Ms. Hall noted that, while that requirement is important if it is gas tank, it is *not* important to actually remove it if it is a Used Oil tank, because it is not contaminating that which is in the tank. Thus, the Department changed that language to requiring that notification must be given to DNREC if the water in the Used Oil UST exceeds two inches, so that the Department can determine if that ingress is from a hole in the tank.

Another addition (pursuant to the EPA's recommendation) is contained in Part "E" with regard to the section concerning "Indicated Releases". The proposed *revised* amendments have added the statement that "Release detection required under these regulations indicates a release may have occurred" to the list of "Indicated Releases" which must be reported to the Department. Language was also added to clarify exactly *who* must report to the National Response Center. Also, in Part "E", the Department added the statement that "DNREC shall ensure that relevant sit release information relating to Remedial Action Plans is available to the public upon request". That has always been the case under the Freedom of Information Act, however, said language was added for greater clarity to satisfy federal requirements.

For Parts "B", "C" and "D", under the list of "Tanks Subject to Routine Inspection Requirements", a proposed addition to existing UST Regulations was *initially* made to require that a manual check of the emergency product shear valves be performed during the course of the thirty (30) day walk-around inspection. The Department subsequently *withdrew* this proposal, based on comment received at the time of the public hearing, noting that damage to the valve would occur from such frequent testing. The Department has now *revised* this proposal to require *annual* checking of the product shear valve. Lastly, under the Financial Responsibility Requirements, the Department requires that insurance companies have a particular rating. An addition of "A.M. Best...or equivalent" has now been incorporated into the list of appropriate ratings.

Ms. Hall noted that, with regard to the two significant changes set forth in the proposal *initial* amendments to the UST Regulations (i.e., the Operator Training Program Requirements and the distance requirements for the installation of new underground

storage tanks from existing water wells), those two changes remain as proposed in April of 2009 at the time of the first public hearing, with no changes having been made to the same.

Lastly, Ms Hall noted that there were several clerical errors which the Department was correcting in the proposed UST Regulation amendments at this time, none of which were substantive in nature.

There were a few clarifying questions and comments made by members of the regulated community at the time of the public hearing held on January 12, 2010. One question, from Mark Baker (representing Wilson Baker, Inc.), requested further clarification with regard to the proposed Operator Training Program. Eric Dana (representing Dana Ins.), offered comment with regard to the Department's requirements for release detection records. Lastly, Jennifer Celeste (representing Sunoco, Inc.) offered comment regarding the testing of product shear valves. In order for the Department to facilitate a full and thorough response to these questions and comments, this Hearing Officer held the record open for an additional ten (10) days, through close of business on Friday, January 22, 2010. On January 21, 2010, the Department provided complete responses to all three of these persons who had posed their questions and comments at the time of the public hearing.

It should be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed *revised* regulatory

amendments to 7 DE Admin. Code 1351, *Delaware Regulations Governing Underground Storage Tank Systems*. Accordingly, I recommend promulgation of these proposed *revised* amendments in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of all proceedings, including both public hearings, in a manner required by the law and regulations;
4. The Department held its public hearings in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 1351, *Delaware Regulations Governing Underground Storage Tank Systems*, will (1) incorporate the federal requirements for a Tank Operator Training Program into Delaware's UST Regulations, as required by the Federal Energy Policy Act of 2005; (2) establish additional requirements prohibiting the installation of new underground storage tanks within specific distances of public, industrial and domestic wells to provide consistency with analogous DNREC Division of Water Resources Regulations to ensure protection of drinking water supplies; (3) add clarifying language to the current UST Regulations in direct response to public comment requesting such, in order to

promote a greater understanding of these regulations to the regulated community; (4) incorporate both corrections and additions to the current UST Regulations to conform to the Federal requirement that State regulations are at least as stringent as the Federal UST Regulations; and (5) make corrections to clerical errors contained in the January 11, 2008 edition of the UST Regulations;

7. The Department has reviewed these proposed *revised* regulatory amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
8. The Department's aforementioned proposed *revised* regulatory amendments concerning the governing of underground storage tanks, as published in the December 1, 2009 *Delaware Register of Regulations* and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
9. The Department shall submit the proposed *revised* regulation amendments as final amendments to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide such other notice as the law and regulations require, and as the Department determines is appropriate .

/s/ Lisa A. Vest
LISA A. VEST
Public Hearing Officer

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