



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**

OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2013-WH-0051

**RE: Approving Final Regulations to 7 DE Admin. Code 1352
 Regulations Governing Aboveground Storage Tanks
 (pursuant to E.O. 36 DNREC Regulatory Review)**

Date of Issuance: November 15, 2013

Effective Date of the Amendment: December 11, 2013

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 regulations to amend 7 DE Admin. Code 1352, *Regulations Governing Aboveground Storage Tanks* ("AST Regulations"), as a result of the Department's exhaustive review of its existing regulations, pursuant to Governor Markell's Executive Order No. 36 (hereinafter referred to as "E.O. 36"). In June of 2012, Governor Markell issued E.O. 36, which directed all state agencies, including DNREC, to perform a focused review of their existing, older regulations, identify and remove regulatory hurdles, and modernize and streamline any regulations that may be outdated or

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unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance.

Among the considerations of the Department's aforementioned focused review of its existing regulations under E.O. 36 was to ensure that the same continued to serve the original purpose for which they were adopted, and to provide for improvements. To that end, the Department's Division of Waste and Hazardous Substances, Tank Management Section, identified 7 DE Admin. Code 1352 as an existing, older regulation which required revision at this time.

The *Regulations Governing Aboveground Storage Tanks* (hereinafter referred to as "AST Regulations") were created under the authority of the Jeffrey Davis Aboveground Storage Tank Act, Title 7, Del.C., Chapter 74A, in 2004. These AST Regulations were last updated in 2005. In response to E.O. 36, the Department has identified three modifications to be made to Delaware's existing AST Regulations:

- Part A., Section 4.6.3., is being modified to extend the required time frame for notification to the Department for a Retrofit or Upgrade from sixty (60) days to one (1) year;
- Part A, Section 5.3., is being modified to require a specific time frame in which the Department must respond to a request for alternative technology approval. Currently, there is no time frame in which DNREC must respond. The proposed change requires the Department to provide a written response within ninety (90) days of receiving a request;

- Part B, Section 1.7, is being modified to allow an Owner or Operator to request a one year extension of the Department's approval for an installation of a new AST.

The Department's Division of Waste and Hazardous Substances commenced the regulatory development process with Start Action Notice 2013-12 (E.O.36). The Department published its initial proposed regulation Amendments in the July 1, 2013 *Delaware Register of Regulations*, and held a public hearing on August 6, 2013.

The proposed Amendments were thoroughly vetted by the Department at the aforementioned public hearing on August 6, 2013. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. With the exception of a few clarifying questions from members of the public made at the time of the aforementioned public hearing, no other public comment was received by the Department during the course of this proposed promulgation. It should also be noted that all proper notification and noticing requirements concerning this proposed promulgation were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated November 4, 2013 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the 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 Amendments. As previously noted, no public comment was received by the Department from the public at any time during the course of this proposed promulgation.

I find that the Department's experts in the Division of Waste and Hazardous Substances fully developed the record to support adoption of these Amendments. The adoption of this Order will enable Delaware to update its existing, older regulation, thereby allowing the Department to (1) extend the timeframe from 60 days to one year with regard to the need for work to commence subsequent to the Department receiving its initial notification; (2) provide better customer service to those who submit alternative technology requests to the Department with regard to aboveground storage tanks by placing a 90 day response requirement on DNREC for the same; and (3) alleviate unnecessary duplication in the submittal process with regard to installation plans for AST matters

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these 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 the initial proposed amendments, including at the public hearing held on August 6, 2013;
- 3.) The Department held a public hearing on August 6, 2013 in order to consider public comment before making any final decision;

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

5.) The adoption of this Order will enable Delaware to update its existing, older AST Regulations by allowing the Department to (1) extend the timeframe from 60 days to one year with regard to the need for work to commence subsequent to the Department receiving its initial notification; (2) provide better customer service to those who submit alternative technology requests to the Department with regard to aboveground storage tanks by placing a 90 day response requirement on DNREC for the same; and (3) alleviate unnecessary duplication in the submittal process with regard to installation plans for AST matters;

6.) The recommended amendments should be adopted as final regulation amendments because Delaware will be able to (1) update its existing, older AST Regulations, and provide additional clarity and understanding to Delaware citizens with regard to these matters; (2) further the purpose of Governor Markell's initiatives as set forth in Executive Order No. 36, to wit: strengthen Delaware's economy by modernizing and streamlining regulations that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance; and, lastly, because (3) the amendments are well supported by documents in the record;

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.



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 *LAV*
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Regulation Amendments to 7 DE Admin. Code 1352:
Regulations Governing Aboveground Storage Tanks
(pursuant to E.O. 36 DNREC Regulatory Review)**

DATE: November 4, 2013

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Tuesday, August 6, 2013, 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 amendments ("amendments") to 7 DE Admin. Code 1352, *Regulations Governing Aboveground Storage Tanks* ("AST Regulations"). This public hearing was held as a result of the Department's review of its existing regulations, pursuant to Governor Markell's Executive Order No. 36 (hereinafter referred to as "E.O. 36"). In June of 2012, Governor Markell issued E.O. 36, which directed all state agencies, including DNREC, to perform a focused review of their existing, older regulations, identify and remove regulatory hurdles, and modernize and streamline any regulations that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance.

Among the considerations of the Department's aforementioned focused review of its existing regulations under E.O. 36 was to ensure that the same continued to serve the original purpose for which they were adopted, and to provide for improvements. To that end, the

Department's Division of Waste and Hazardous Substances, Tank Management Section, identified 7 DE Admin. Code 1352 as an existing, older regulation which required revision at this time.

The *Regulations Governing Aboveground Storage Tanks* (hereinafter referred to as "AST Regulations") were created under the authority of the Jeffrey Davis Aboveground Storage Tank Act, Title 7, Del.C., Chapter 74A, in 2004. These AST Regulations were last updated in 2005. In response to E.O. 36, the Department has identified three modifications to be made to Delaware's existing AST Regulations:

- Part A., Section 4.6.3., is being modified to extend the required time frame for notification to the Department for a Retrofit or Upgrade from sixty (60) days to one (1) year;
- Part A, Section 5.3., is being modified to require a specific time frame in which the Department must respond to a request for alternative technology approval. Currently, there is no time frame in which DNREC must respond. The proposed change requires the Department to provide a written response within ninety (90) days of receiving a request;
- Part B, Section 1.7, is being modified to allow an Owner or Operator to request a one year extension of the Department's approval for an installation of a new AST.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 1352, *Regulations Governing Aboveground Storage Tanks*, pursuant to 7 *Del. C.*, Chapter 74A, The Jeffrey Davis Aboveground Storage Tank Act. The Department's Division of Waste and Hazardous Substances commenced the regulatory development process with Start Action Notices 2013-12 (E.O.36). The Department

published its initial proposed regulation amendments in the July 1, 2013 *Delaware Register of Regulations*, and held the public hearing on August 6, 2013. It should be noted that public comment was received by the Department at the time of the public hearing on August 7, 2013, and the same will be discussed below. 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 (2) five documents introduced at the public hearing held on August 6, 2013, and marked by this Hearing Officer accordingly as Department Exhibits 1-5. The Department's person primarily responsible for the drafting and overall promulgation of these proposed amendments, Jill Williams Hall, Planner for the DNREC's Tank Management Section, 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 August 6, 2013, Ms. Hall proceeded to offer a brief summary as to the Department's proposed actions for the benefit of the record developed in this matter (see Section I of this Report for said summary). Subsequently, comment was received from William Dunn, a private citizen, who had attended the hearing to learn more detail of the changes that were being proposed to the existing AST Regulations, and how such changes might impact individuals in the community. Discussion then ensued between Mr. Dunn, Ms. Hall, and Alex Rittberg, the Department's Program Manager of the Tank Management Section, concerning how the proposed changes will affect the Department's existing AST program.

In the course of responding to Mr. Dunn's questions concerning the specifics of the Department's proposed amendments to the existing AST Regulations, both Ms. Hall and Mr. Rittberg clarified for the record the following matters:

1. With regard to the changes proposed for Part A, Section 4.6.3., the current regulation states that "If within 60 days after initial notification to the Department work has not commenced, a new registration form shall be submitted to the Department". The *proposed* amendment is to say, "If within one year after initial notification to the Department work has not commenced, a new registration form shall be submitted to the Department." This change, explained Mr. Rittberg, would be for a retrofit or upgrade of an aboveground storage tank. Thus, it just extends the timeframe from 60 days to one year that such notification would be valid. It would not include new aboveground storage tanks. Mr. Dunn inquired as to whether the Department is aware of any circumstances in the past 2-3 years where that 60-day time window ran out, thus prompting this change. Mr. Rittberg replied that he was unaware of any such circumstance at this time, but would have to go back and check the Department's records and talk to staff to see whether such an occurrence had actually taken place.
2. The second proposed change, at Part A, Section 5.3, currently states "The Department will provide a written response to all requests for alternative technology approvals. The request may be denied, approved, or approved with conditions. If the technology or procedure or a combination of technologies or procedures is approved, the owner and operator shall comply with any conditions imposed by the Department on its use for the protection of human health, safety or the environment." The proposed change

puts a timeframe during which the Department must respond. Thus, once modified, it would read, "The Department will provide a written response within 90 days to all requests for alternative technology approvals." Currently, this Section is completely open-ended, with no timeframe in which the Department must respond. The Department is now seeking to put a limit on itself so that it must respond within 90 days, in order to provide better customer service to those who are submitting alternative technology requests. Mr. Dunn stated that, given the fact the Department is proposing this change implies that there have been circumstances where people interested in addressing an issue with an aboveground storage tank waited longer than 90 days for a response from DNREC. Thus, to put a time window on the matter that would be acceptable to businesses is "okay".

3. The final proposal, at Part B, Section 1.7, states as follows: "General Requirements for All New ASTs and AST Relocations. A formal approval of installation shall be valid for one year from the date of approval. If construction of the AST is not initiated within one year of the issuance of the Department's letter for approval, the approval shall lapse." The *proposed* change is to add, "A formal approval of installation shall be valid for one year from the date of approval. If construction of the AST is not initiated within one year of issuance of the Department's letter of approval, the owner or operator shall request an extension in writing, including the cause for the delay and the expected ate of construction, or the approval shall lapse." Mr. Dunn again asked whether the Department was aware of any circumstance where construction did not begin in less than one year. Mr. Rittberg responded in the affirmative, noting that Magellan, at the Port of Wilmington, had an approval to

construct 12 large aboveground storage tanks for the storage of petroleum compounds, but they went beyond the year and had to submit a new, revised installation plan. Given the amount of duplicative work that process necessitated, Mr. Rittberg explained that the Department now seeks to change the same with the proposed amendments to this Section of the existing AST Regulations. When Mr. Dunn asked whether there were any other circumstances that occurred similar to the Magellan incident, Ms. Hall stated that this was the only instance she could recall at that time.

After hearing the Department's discussion as detailed above, Mr. Dunn had no further questions or comment. Mr. Dunn was reminded at that time that the record would remain open for an additional 15 days for receipt of additional comment, should the same be received by the Department, and that the record would formally close for additional comment at the close of business on August 21, 2013.

In addition to Mr. Dunn's questions and comments, Helen Hauser also had a few questions concerning some activity that had been occurring in the Pleasant Hill Neighborhood with regard to the recent installation of some AST tanks, and whether such activity would be relevant to the proposed changes to these regulations. Mr. Rittberg replied that the Department had not received a new application concerning such activity, but there would be relevance to the proposed amendments if an installation approval was granted by DNREC and then the responsible party failed to build within the year. Ms. Hall further explained that if this questioned activity concerned the construction of two completely new tanks, then it would not be considered a retrofit and/or upgrade. The only one of the proposed changes that would apply to this situation would be the third proposed change, i.e., if construction did not begin within one

year, then a request for an extension could be made in writing, giving the Department the reason(s) for the delay and the new expected date of construction. Further, both Ms. Hall and Mr. Rittberg verified that, when additional tanks go up on a site where tanks exist already, it would still be considered new construction if the responsible party is building from the ground up. And the size and the contents of such tanks do matter when it comes to what regulations apply.

Following the above concerns being addressed by Department staff, no further questions or comments were offered by any members of the public at the time of the public hearing on August 6, 2013, nor were any additional comments received by the Department prior to the record formally closing with respect to public comment on August 21, 2013.

For the Secretary's review, and in order for the Secretary to gain a thorough understanding of this proposed promulgation, copies of the above-referenced proposed amendments are attached hereto as Appendix "A", and the same are expressly incorporated into this Hearing Officer's Report. It should be noted that the Department adhered to all appropriate Delaware statutes and the regulatory development process in this matter, and that the Department has met the required public notice obligations regarding these proposed amendments. It should also be noted that the Department has reviewed this proposed promulgation 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.

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 amendments to 7 DE Admin. Code 1352, *Regulations Governing Aboveground Storage Tanks*, as noted above. Accordingly, I

recommend promulgation of these proposed 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 in a manner required by the law and regulations;
4. The Department held its public hearing in a manner required by the law and regulations;
5. Promulgation of the proposed regulatory amendments to 7 DE Admin. Code 1352, *Regulations Governing Aboveground Storage Tanks*, will enable Delaware to update this existing, older regulation, thereby allowing the Department to (1) extend the timeframe from 60 days to one year with regard to the need for work to commence subsequent to the Department receiving its initial notification; (2) provide better customer service to those who submit alternative technology requests to the Department with regard to aboveground storage tanks by placing a 90 day response requirement on DNREC for the same; and (3) alleviate unnecessary duplication in the submittal process with regard to installation plans for AST matters;
6. Additionally, promulgation of this proposed regulatory action by the Department will further the purpose of Governor Markell's initiatives as set forth in Executive Order No. 36, to wit: to strengthen Delaware's economy by modernizing and streamlining

regulations that may be outdated or unnecessarily burdensome, while maintaining the state's commitment to improving public health and environmental performance;

7. The Department has reviewed these proposed 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 regulatory amendments to 7 DE Admin. Code 1352, *Regulations Governing Aboveground Storage Tanks*, as published in the July 1, 2013 *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 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.


LISA A. VEST
Public Hearing Officer

