



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

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SECRETARY

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Secretary's Order No.: 2019-WH-0047

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 1351:
*Underground Storage Tank Systems***

Date of Issuance: December 12, 2019

Effective Date of the Amendment: January 11, 2020

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the Record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to proposed regulation amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems* ("Amendments"). This action is being taken by the Department so that Delaware's UST Regulations will properly reflect (1) recent regulatory changes promulgated at the federal level by the United States Environmental Protection Agency ("EPA"); and (2) recent advances in Underground Storage Tanks ("UST") system technologies. It should be noted that Delaware's UST Regulations must be at least as stringent as the correlating federal regulations, pursuant to the requirements of 40 CFR 281, *State Program Approval*. Additionally, the proposed Amendments will clarify and improve installation, operation and maintenance, release detection and remedial requirements.

The EPA recently promulgated revisions to update both the federal *Underground Storage Tank Regulations* and the *State Program Approval Regulations*. Those revisions were published in the July 15, 2015 edition of the *Federal Register*, and were codified at 40 CFR 280-281 (*Revising Underground Storage Tank Regulations—Revisions to Existing Requirements; and New Requirements for Secondary Containment and Operator Training*, respectively).

The aforementioned revisions promulgated by the EPA included the following: (1) the addition of secondary containment requirements for new and replaced tanks and piping, operator training requirements, and periodic operation and maintenance requirements for UST systems; (2) the addressing of UST systems deferred in the 1988 UST regulation; (3) the addition of new release prevention and detection technologies; (4) the updating of practice codes; (5) the creation of editorial corrections and technical amendments; and (6) the updating of state program approval requirements to incorporate these new changes. In support of that promulgation, the EPA has stated that the above revisions at the federal level will protect human health and the environment by reducing the number of releases to the environment, and quickly detecting releases, should they occur.

The Department is charged with adhering to the recommendations and standard procedures of organizations as set forth under 7 *Del.C.* §7403. In preparation for this proposed promulgation, specifically, to make Delaware's existing UST Regulations as stringent as the correlating federal regulations at 40 CFR 281, *State Program Approval*, the Department established the Underground Storage Tank Advisory Committee ("USTAC"). The USTAC consisted of stakeholders within Delaware's regulated UST community who were charged with exchanging ideas and soliciting feedback regarding the Department's proposed UST Regulations. Between October 2016 and January 2019, the USTAC met eight (8) times, allowing the public the opportunity to make comment at each meeting. On January 22, 2019, the USTAC finalized its recommendations to the Department with regard to the draft Amendments.

It should be noted that Delaware's existing UST Regulations (7 DE Admin. Code 1351) provide a significant part of the regulatory basis to other Department regulations promulgated by the Division of Air Quality, namely, 7 DE Admin. Code 1124, *Control of Volatile Organic Compound Emissions*, Sections 26 and 36 (*Gasoline Dispensing Facility Stage I Vapor Recovery and Vapor Emission Control at Gasoline Dispensing Facilities*, respectively). To that end, the Department's Division of Waste and Hazardous Substances held joint workshops regarding this proposed promulgation with the Department's Division of Air Quality, in both New Castle County (at 10:00 a.m.) and Kent County (at 6:30 p.m.), on April 16, 2019.

The April 16, 2019 joint workshops provided the opportunity for Department staff from both the Division of Air Quality and the Division of Waste and Hazardous Substances to discuss numerous proposed regulatory revisions with the public, specifically: (1) phasing out Stage II vapor recovery systems at Delaware gasoline dispensing facilities; (2) establishing effective controls on vapor emissions from gasoline dispensing facilities, and ensuring gasoline USTs remain vapor tight once Stage II systems are removed; and (3) reviewing the changes required due to the promulgation of new UST regulations by EPA at the federal level. The Department answered all questions received from the public at these workshops, and considered all of the public comments which were received through April 17, 2019. No substantive changes to the Department's proposed Amendments were determined to be necessary at that time, and thus the public hearing regarding this matter was scheduled for August 27, 2019.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these proposed Amendments, pursuant to 7 *Del. C.* §§7406 - 7408. The Department published its initial proposed regulation Amendments in the August 1, 2019 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on August 27, 2019.

It should be noted that, subsequent to the publication of the Department's initial proposed Amendments in the *Register* on August 1, 2019, but prior to the public hearing of August 27, 2019, the Department found numerous clerical errors contained in the Amendments as published. The Department made the necessary corrections to the initial proposed Amendments, and then fully vetted the proposed *revised* Amendments to the public at the time of the aforementioned public hearing. To aid the public's review and understanding of these corrections, the Department also provided a Regulatory Revisions Summary Chart, summarizing all changes necessitated to the initial proposed Amendments, specifically: (1) the specific regulatory section affected by the error; (2) the version that was published by the *Register* on August 1, 2019; and (3) the *revised* regulatory language proposed by the Department in this matter.

Two members of the public attended the aforementioned public hearing, with one comment received by the Department at that time. Pursuant to 29 *Del.C.* §10118(a), the hearing record ("Record") remained open for receipt of additional written comment for 15 days following the public hearing. The Record formally closed for comment in this matter on September 11, 2019, with one additional comment received by the Department during the post-hearing phase of this formal promulgation. All notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

After the close of the comment period, the Department's Division of Waste and Hazardous Substances performed a review of the Record, including the comments received on the proposed *revised* Amendments. At the request of the presiding Hearing Officer, a Technical Response Memorandum ("TRM") was prepared by Department staff to serve as a comprehensive summary of the comment received in this matter. The Department's TRM not only provides a thorough discussion of the comment received in this matter, but also provides the Department's responses and recommendations concerning the same. Furthermore, the TRM notes that none of the comments received in this matter warranted changes to the proposed *revised* Amendments.

Hearing Officer Lisa A. Vest prepared her Report dated November 1, 2019 (“Report”), which expressly incorporated the Department’s proposed *revised* Amendments, the Department’s Regulatory Revisions Summary Chart (detailing the clerical corrections and non-substantive revisions made to the initially proposed Amendments subsequent to the August 1, 2019 publication in the *Delaware Register of Regulations*), and the aforementioned TRM into the Record generated in this matter. The Report documents the proper completion of the required regulatory amendment process, establishes the Record, and recommends the adoption of the proposed *revised* Amendments as attached to the Report as Appendix “A.”

Reasons and Conclusions

Based on the Record developed by the Department’s experts and established by the Hearing Officer’s Report, I find that the proposed *revised* regulatory amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems*, are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed *revised* Amendments be promulgated as final. I further find that the Department’s experts fully developed the record to support adoption of these *revised* Amendments.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed *revised* regulatory amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems*, pursuant to 7 Del. C. §§7406 – 7408;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 Del.C. Ch. 60, to issue an Order adopting these proposed *revised* Amendments as final;

3. The Department provided adequate public notice of the initial proposed Amendments, and all proceedings in a manner required by the law and regulations. The Department also provided the public with an adequate opportunity to comment on the proposed *revised* Amendments, including at the time of the public hearing held on August 27, 2019, and during the 15 days subsequent to the hearing (through September 11, 2019), in order to consider all public comment on the same before making any final decision;

4. Promulgation of the proposed *revised* Amendments will enable Delaware's UST Regulations to properly reflect (1) recent regulatory changes promulgated at the federal level by the EPA; and (2) recent advances in Underground Storage Tanks ("UST") system technologies.

5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible, and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

6. The Department's Hearing Officer's Report, including its established Record and the recommended proposed *revised* Amendments as set forth therein in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;

7. The Department's proposed regulatory Amendments, as initially published in the August 1, 2019 *Delaware Register of Regulations*, and then as *revised*, as set forth in Appendix "A" of the Report as noted above, 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

8. The Department shall submit the proposed *revised* Amendments as final Amendments 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.

A handwritten signature in blue ink, appearing to read 'S.M. Garvin', written over a horizontal line.

Shawn M. Garvin
Secretary

