

# Changes to Delaware's Underground Storage Tank Cleanup Liability

**Alex Rittberg**

DNREC Tank Management Section

[Alex.Rittberg@state.de.us](mailto:Alex.Rittberg@state.de.us)

302-395-2500

<http://www.dnrec.delaware.gov/tanks/Pages/default.aspx>

# Out of Service Orphan and Enforcement Projects





## Owner History

Owner 5	2008
Owner 4	2007
Owner 3	2001
Owner 2	1998
Owner 1	1985

## Release History

Confirmed Release #3	2008
Confirmed Release #2	2003
Confirmed Release #1	1998

# UST Bill Signed October 6, 2014



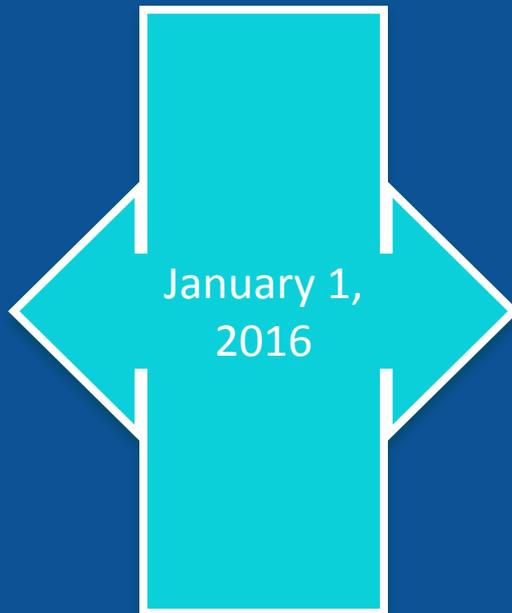
# Changes to UST Cleanup Liability

- Current remedial liability involves a responsible party that proximately caused the release.
- Beginning January 1, 2016, property owners and operators will be responsible parties with strict, joint and several liability for cleanup of the property that **contains or previously contained** underground storage tanks, **regardless of whether or not the owner or operator caused the release; or how, or when, the release occurred**, subject to certain defenses.

# Changes to UST Cleanup Liability

Different than HSCA in that persons who were responsible parties prior to January 1, 2016, but no longer own or operate the facility continue to be liable for cleaning up past releases of gasoline that they proximately caused.

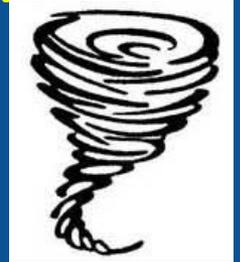
Everyone  
subject to  
proximate  
cause



- If you own or operate the facility on or after January 1, 2016, you are subject to strict, joint and several liability
- If you owned or operated the facility prior to January 1, 2016 and no longer own or operate it on or after January 1, 2016, you remain subject to proximate cause liability.

# Changes to UST Cleanup Liability

Responsible Party is not liable if the.....



Release was caused solely by an Act of God or an Act of War.

Release was caused solely by a third party:



1) other than the owner's employee; or

2) other than a third party with a contractual relationship with the owner not related to the sale or transfer of the property.

For these defenses to apply, owners and operators must express due care at their facility, and take into account the foreseeable acts or omissions of the third party.



Third party in a contractual relationship with the owner arises from the sale of the property.

**Seller is not liable for future releases when:**

- Seller has demonstrated due care for the property during their ownership.
- Seller has demonstrated due care to the foreseeable actions of future owners based on knowledge at the time of sale of the property.



Third party in a contractual relationship with the owner arises from the sale of the property.

- Buyer is not liable for past releases when the Buyer has no knowledge or reason to know, at the time of purchase, of any prior release.
- This requires All Appropriate Inquiry at the time of purchase.
- For commercial property, this is a Phase I and Phase 2 environmental assessment.



# Changes to UST Cleanup Liability

The law now states that responsible parties have a right of contribution. In resolving contribution claims, the Superior Court may allocate costs among the responsible parties using such principles of fairness and justice as the Superior Court deems appropriate.



# Lender & Fiduciary Liability Protections

- Lenders are not liable when they foreclose as long as they notify the DNREC within 30 days of filing a foreclosure.
- Empty the USTs within 60 days.
- Do not participate in management or engage in petroleum production, refining, or marketing.



# Important Considerations-NFA

- 2690 Cleanups have been completed that involved a release of gasoline, diesel fuel, used oil, or aviation fuel.
- 1626 Cleanups completed that involved a release of heating fuel

We are not looking to re-open closed cleanup projects.

If a project is currently state lead it will remain state lead.

STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL  
DIVISION OF WASTE AND  
HAZARDOUS SUBSTANCES



TANK MANAGEMENT SECTION  
391 LUKENS DRIVE  
NEW CASTLE, DE 19720  
TELEPHONE: (302) 395-2500  
FAX: (302)395-2555  
WWW.DNREC.DELAWARE.GOV/TANKS

April 5, 2013

[Redacted]

FACILITY: \_\_\_\_\_ Facility ID: \_\_\_\_\_  
Project #: \_\_\_\_\_  
File Code: \_\_\_\_\_

SUBJECT: **No Further Action Required - Tank Removal**

1) underground storage tank (UST) was removed, without proper notification, at this facility. On December 6, 2012 the notification form was submitted and February 7, 2013 soil samples were collected and analyzed for petroleum contamination. The analytical results are as follows:

Analyte (action level, mg/kg)	Shallow Composite Sample (mg/kg)	Deep Grab Sample (mg/kg)
<b>DERBCAP* Tier 0</b>	<b>Tank 1: 500 gallon used oil UST</b>	
TPH-GRO (100)	BDL	BDL
TPH-DRO (1000)	26.2	19.2
BTEX (10)	BDL	BDL
Benzene (0.230)	BDL	BDL
TPH-GRO (100)	BDL	BDL
MTBE (0.130)	BDL	BDL

\*Delaware Risk-Based Corrective Action Program      \*\*BDL- Below the Detection Limit of the Analyses Performed

Based on these results, it appears that any residual contamination at this location poses no threat to human health and safety, and to the environment, and No Further Action (NFA) is required at the present time. The site may be used without restriction. This No Further Action letter relates only to liability under 7 Del.C., Chapter 74 and does not represent a determination under any other State or federal law.

# Important Considerations-FR

## Maintain your tank insurance!

- Delaware **does not** have a state cleanup fund.
- Instead, we require owners and operators of certain underground storage tanks (USTs) to maintain up to \$1 million dollars of financial assurance to pay for a cleanup or 3<sup>rd</sup> party damages.



# Important Considerations- BF

A Buyer of a commercial UST facility can limit their liability by utilizing the State's Brownfields Program.

- A release from an UST can be considered a release under HSCA and addressed through a Brownfields Cleanup.

## What are the Benefits?

- Liability Protection for the Brownfields Developer once a Brownfields Development Agreement is signed.
- The opportunity for state grant funds to perform tank removals, and additional cleanup work.



Before



After

# Important Considerations-HF

The changes to the UST cleanup liability also apply to residential properties that have had a release from a home heating fuel UST.

## Heating Fuel UST Closure Assistance Program

- DNREC will pay to remove or close in place residential & commercial tanks buried below ground that hold 1,100-gallons or less of heating fuel.
- Since March 2015, we have received over 175 applications for the program, and removed or closed in place over 111 tanks.



# Summary

- Cleanup liability relating to releases from underground storage tanks will change from proximate cause to strict, joint and several liability on January 1, 2016.
- There are different ways currently and in the future to manage and reduce your liability.
- DNREC is amending its regulations to reflect the statutory changes.

# Public Hearing

A Public Hearing is scheduled on  
December 1<sup>st</sup> 2015 from 6-8PM  
At DNREC's New Castle Office  
391 Lukens Drive  
New Castle DE  
19720

# Supporting Regulations Needed

6.2.1 The DNREC Tank Management ~~Branch~~ Section shall issue a letter requiring no further action (NFA letter) and documenting that site cleanup objectives have been met. The issuance of the NFA letter ~~no further action approval~~ does not absolve the Responsible Parties from previously incurred or potential future liability.

This first change amends the regulations to make reference to an NFA Letter being issued by our Department.

# Supporting Regulations Needed

6.2.2 The ~~no further action~~ NFA letter applies to site conditions at the time that the request for no further action was made. Except as discussed in 6.2.3, once the Department has issued a NFA letter associated with a release, the Department shall not require Responsible Parties to perform additional corrective actions associated with the release unless site conditions, including but not limited to the current or future land use, change or there is new information that the release poses an unacceptable risk to human health, safety, and the environment.

This second change reinforces the fact that we will not re-open sites that have received an NFA letter, unless the land use changes or the site presents a risk to human health or the environment.

# Supporting Regulations Needed

6.2.3 The Department shall not require Responsible Parties to perform additional corrective actions associated with an underground storage tank (UST) system when all of the following conditions have been met: (1) the Department has issued any type of NFA letter, either with conditions for future management or without conditions for future management after the removal or closure in place of the UST System, (2) the UST system was located on a residential property, (3) the underground storage tank associated with the UST system contained heating fuel used for Consumptive Use On the Premises.

This third change amends the regulations to state that the Department will not require responsible parties to perform additional corrective actions for a heating fuel tank cleanup on a residential property, once an NFA letter has been issued, and the tank has been either removed or closed in place.

# Supporting Regulations Needed

6.2.34 Any Person disturbing any residual contamination at the site by digging, boring, excavating, dewatering, or other means, shall submit a contaminated material management plan to the Department for approval prior to work commencing and shall be financially responsible for implementing it.

This fourth change clarifies that a responsible party is liable for implementing a contaminated material management plan when redevelopment occurs and soils are disturbed.

# Supporting Regulations Needed

## 8.0 All Appropriate Inquiry

8.1 When residential property is purchased by an individual, individuals, or a nonprofit agency as defined by the Internal Revenue Service or State law, a title search and a visual inspection by the purchaser or his or her agent that is intended to locate evidence of a UST system on the property shall constitute all appropriate inquiry pursuant to 7 Del Code, Chapter 74 Section 7406e(2)(b).

**This last change is needed to add an all appropriate inquiry standard for residential properties.**

# Next Steps

- Publish the proposed regulations in the Delaware Register and conduct a public hearing on the proposed regulations on December 1, 2015.
- Receive comments on these proposed regulations through the end of the public comment period.
- Assist stakeholders with understanding the changes to the regulations.

# Questions