

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed Regulatory Amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems***

DATE: December 28, 2020

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, December 9, 2020, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) to receive comment on proposed regulatory amendments (“Amendments”) to 7 DE Admin. Code 1351: *Underground Storage Tank Systems* (“UST Regulations”). The Department is proposing these Amendments at this time to (1) clarify existing regulatory language; (2) provide additional clarifying language; (3) include a federally mandated compliance deadline; and (4) correct various typographical and grammatical errors in Delaware’s current UST Regulations. 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*.

The following Sections of the existing UST Regulations are directly affected by the aforementioned proposed Amendments:

- Part A: Definitions and Notification
- Parts B/C/D: Installation, Operation and Maintenance
- Part E: Reporting, Release Investigation and Remedial Action
- Part F: Financial Responsibility

In Part “A,” Section 2.0, the phrase “UST top sumps” is being changed to “Tank Top Sumps,” to mirror the federal requirement found at 40 CFR 280.13 for the definition of “Containment Sump.” In Section 4.0, under *Multiple Use Notification Requirements*, additional references are being provided to include “Part H (Field-Constructed UST Systems)” and “Part I (Airport Hydrant Fuel Systems)” therein. The identical requirements from Part “A” apply to USTs regulated under the newly added Parts “H” and “I,” so the references to those Parts are now being included here. Also, in Section 4.0, additional Post-Construction Testing and Site Assessment references are being provided for “Part C (Consumptive Use Heating Fuel UST Systems)” and “Part D (Hazardous Substances UST Systems).” These additional references serve as clarifications for the regulated community, as the additional references from Part “B” are applicable to the Underground Storage Tanks (“USTs”) regulated under Parts “C” and “D.”

In Parts “B/C/D,” numerous corrections to clerical errors found throughout the existing regulatory language are being made at this time. Of particular note, in Part “B,” Section 1.0, under *Marina Fueling Facility USTs*, “NFPA 30A Applicability,” the phrase “after January 11, 2020” is being changed to “installed on or after January 11, 2008.” This change serves not only as a correction, but also as a clarification to the regulated community. NFPA 30 requirements were incorporated in Delaware as part of the Department’s January 11, 2008 UST regulatory promulgation. Thus, the NFPA 30 requirements only apply to marina UST systems installed on or after January 11, 2008. Also, in Sections 1.0 and 2.0, references are being added to the existing regulatory language to include the phrase “adherence to manufacturer’s specifications” to serve as additional guidance and clarification for the regulated community.

One of the most significant additions to Sections 1.0 and 2.0 of Parts “B/C/D”, specifically, under *Overfill Prevention Equipment*, now includes the following important Federal mandate (40 CFR 280.35):

The first inspection shall occur prior to October 13, 2021.

The above deadline inclusion is applicable to all USTs regulated under Parts “B/C/D,” but was erroneously omitted from the Department’s most recent UST regulatory update. This particular change now corrects that omission.

Continuing on in Part “B,” Sections 1.0 and 2.0, the Department is correcting the term “line leak detection” to “piping release detection.” This is a defined term correction for consistency in the language found throughout the existing UST Regulations. Also, the word “additional” is being deleted from the Section 1.0 heading. The Department notes that USTs are regulated by 40 CFR 280 and, as such, the requirements specified are not considered to be “additional.” Numerous clerical and citation corrections have been made in these Sections at this time as well, again, in order to correct previous errors and omissions.

In Section 5.0 of Part “E” and Section 1.0 of Part “F,” the phrase “*Hazardous Substances*” is being changed to “*Regulated Substances*.” Once again, this is a defined term correction to promote language consistency by using the definition as set forth previously in Part “A,” Section 2.0 of 7 *Del.C.* §§7907 and 7920. Also, in Section 6.0 of Part “E,” under “*Institutional Controls*,” the Department seeks to change the term “*replacement*” with “*placement*” of environmental covenant. This is yet another defined term correction, again using the definition as set forth in Part “A,” Section 2.0 of 7 *Del.C.* §§7907 and 7920.

As is the case in Part “A” noted above, additional references are being provided in Section 1.0, “*Applicability*” of Part “F” to include “Part H (Field-Constructed UST Systems)” and “Part I (Airport Hydrant Fuel Systems).” This is a federal regulatory reference clarification, as 40 CFR 280.251 requires financial responsibility for new field-constructed tanks and airport hydrant fuel systems no longer deferred from regulations. Lastly, also in Section 1.0 of Part “F,” a syntax correction to capitalize the term “Regulated Substances” is being made at this time.

The Department has the statutory basis and legal authority to act with regard to the proposed regulatory amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems*, pursuant to 7 *Del.C.* §§7406 - 7408. The Department published its initial proposed Amendments in the November 1, 2020 *Delaware Register of Regulations*. Thereafter, the virtual public hearing regarding this matter was held on December 9, 2020.

No members of the public attended the virtual public hearing held on December 9, 2020. Pursuant to 29 *Del.C.* §10118(a), the hearing record (“Record”) remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The Record formally closed with regard to public comment at close of business on December 24, 2020, with only one written comment received by the Department during the post-hearing phase of this regulatory promulgation.

Subsequent to the close of the Record, the Department’s Division of Waste and Hazardous Substances staff prepared a Technical Response Memorandum (“TRM”), at the request of this Hearing Officer, which responded to the supportive comment received from the public concerning the Department’s proposed Amendments. It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents: (1) a verbatim transcript; (2) ten (10) documents introduced by Department staff at the public hearing held on December 9, 2020 and marked by this Hearing Officer at the time of the hearing accordingly as Department Exhibits 1-10; and (3) a Technical Response Memorandum (“TRM”) from Jason W. Sunde, Program Administrator, Division of Waste and Hazardous Substances, offering the Department’s formal responses to the one comment received from the public in this matter. The Department’s person primarily responsible for the drafting and overall promulgation of these proposed Amendments, Mr. Sunde, developed the Record with the relevant documents in the Department’s files.

As stated previously, only one comment was received by the Department during the post-hearing phase of this promulgation. That comment, received electronically from an individual identified as “Courtney” (full name not provided), voiced support of the Department’s proposed Amendments to 7 DE Admin. Code 1351 at this time.

The Department’s proposed Amendments, as set forth above, and the Department’s TRM, dated December 28, 2020, formally recognizing the supportive comment received from the public in this matter, are both expressly incorporated into the Record generated in this matter, and are attached hereto as Appendices “A” and “B,” respectively.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the Record developed in this matter, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed regulatory amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems*, as noted above. Accordingly, I recommend promulgation of the same, in the customary manner provided by law.

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

1. The Department has the statutory basis and legal authority to act with regard to the proposed 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.* Chapter 60, to issue an Order adopting these proposed Amendments as final;
3. The Department provided adequate public notice of the 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 Amendments, including at the time of the virtual public hearing held on December 9, 2020, and during the 15 days subsequent to the hearing (through December 24, 2020), in order to consider all public comment on the same before making any final decision;

4. Promulgation of the proposed Amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems* will enable Delaware’s UST Regulations to (1) clarify existing regulatory language; (2) provide additional clarifying language; (3) include a federally mandated compliance deadline; and (4) correct various typographical and grammatical errors in the current UST Regulations;

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 proposed regulatory Amendments, as initially published in the November 1, 2020 *Delaware Register of Regulations*, 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*;

7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

8. The Department shall submit the proposed Amendments as final regulatory amendments to the *Delaware Register of Regulations* for publication in its next available issue and shall provide such other notice as the law and regulation require, as the Department determines is appropriate.

/s/Lisa A. Vest
LISA A. VEST
Regulatory Specialist

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Attachments:

Appendix A: Proposed UST Reg. Amendments
Appendix B: TRM (12/28/2020)