

HEARING OFFICER'S REPORT

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

FROM: Theresa Smith
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 1, 2023

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, August 30, 2023, at 6:00 p.m. via the State of Delaware Zoom Platform by the Department of Natural Resources and Environmental Control (“DNREC”, “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 to amend regulatory requirements for owners/operators of underground storage tanks to: (1) improve clarity for the regulated community, and (2) incorporate by reference three documents (*Delaware Risk-Based Corrective Action Protocol, Volume 2; Hydrogeologic Investigative Guidance, Volume 2; and Vapor Intrusion Guidance*).

In accordance with 7 *Del.C.* Chapter 74, the Department regulates the installation, operation, retrofitting, and abandonment of Underground Storage Tanks (UST) to prevent and detect leakage of USTs and the area it may leak, ultimately to protect human health, safety and the environment. The Regulation applies to owners and operators of underground storage tanks that contain regulated substances described in the Regulation.

More specific to the proposed Amendments, if a leakage of an underground storage tank is to occur, known as a Release, the Department implements corrective action protocols. A “Release” is overfilling, leaking, emitting, discharging, escaping, leaching or disposing of a Regulated Substance into groundwater, surface water, air, or soil. If a Release is to occur, the Department references the *Delaware Risk-Based Corrective Action Protocol* (“DERBCAT”) as a guidance for soil screening and cleanup measures, for owners and operators of underground storage tanks.

The *DERBCAT Volume 1*, was established in January 2020 by the Department and is a fluid document that provides for quantitative risk-based decision-making at leaking tank system sites. The DERBCAT is based on the *American Society for Testing and Materials (ASTM) E 1739-95(2015) Standard Guide for Risk-Based Corrective Action at Petroleum Release Sites* and meets the requirements in Delaware's Regulations Governing Underground Storage Tank Systems. The Department developed the DERBCAT with the assistance of the ASTM, the Partners in RBCA Implementation, the Hazardous Substance Cleanup Act Advisory Committee, and the Underground Storage Tank Advisory Council. Like many other States that established their own risk-based corrective action protocols, Delaware has adopted various language from the ASTM Risked-Based Corrective Action standard.

In January 2023, the Department established *DERBCAT Volume 2*. The newest version updates definitions and references and revises the risk-based screening levels to current standards. Currently, DERBCAT is available for owners and operators to reference for guidance for soil screening and cleanup measures however, the content of the document is not enforceable through regulatory authority.

The Department recognized that there was a need to clarify the standards for the identification and remediation of Releases from underground storage tanks and is proposing to implement, by incorporating by reference, the DERBCAT into the Regulation. Additionally, DERBCAT references the *Hydrogeologic Investigative Guidance, Volume 2*; and *Vapor Intrusion Guidance*. To ensure a comprehensive inclusion through cross-referencing, the Department is also proposing Amendments to incorporate by reference the *HIG, Volume 2*, and the *VIG* into the Regulation.

The *HIG Volume 2* serves as a document to assist consultants, responsible parties, and the public with the requirements established in Part E §4.2 of the Regulation- *Requirements for Reporting, Release Investigation, Remedial Action, and No Further Action Determinations For Underground Storage Tank Systems*. The *HIG* outlines the steps for effectively fulfilling the hydrogeologic investigation which includes determining the nature of the Release, the extent of the Release, the physical characteristics of the site where the Release occurred, and the potential risks posed by the Release in accordance with the DERBCAP.

The *VIG* serves as a document to ensure consistency in assessing vapor intrusion risk from the investigative phase, through remediation. The guidance identifies vapor intrusion as a pathway for human exposure to dangerous levels of toxic vapors. It outlines a structured approach to assessing vapor intrusion risk for substances like petroleum and chlorinated solvents, along with other vapors, using screening levels. Additionally, it explains the circumstances that require a vapor intrusion investigation, outlines procedures for evaluating the associated risks, assessing remedial alternatives, and provides direction for developing Long-Term Stewardship Plans.

In addition to incorporating by reference the three documents, the Department is proposing to revise language throughout the Regulation. In alignment with Delaware's regulatory style manual, the Department is proposing to convert numbers written as a word to numerical digits. The Department is also proposing to update the American Petroleum Institute Color Symbol System to reflect the newest version published as the fourth edition in April 2020 and include revisions to definitions. More specifically, the proposed definitions include revisions to "Underground Storage Tank" to mean each compartment will be considered an individual UST. Currently, regardless of the number of compartments, an UST is considered as a single entity. Additional terms have also been defined for such as DERBCAP, HIG, Site Assessment, Tank, and Tier 0.

The Department also proposes new sections under Part A of the Regulation to consolidate duplicative language through the Sections B, C, and D of the Regulation and *DERBCAT Volume 2*, by adding the following section:

- Section 15.0 - Repair, Retrofits and Upgrade Requirements moved from Parts B, C, and D
- Section 16.0 - Change in Service and Empty UST Systems; moved from Parts B, C, and D
- Section 17.0 - Change in Substance Stored requirements moved from Parts B, C, and D
- Section 18.0 - Removal or Closure in Place requirements moved Parts B, C, and D

The Department held two hybrid public workshops, in-person and virtually, on May 21, 2023, and May 24, 2023, to receive comments on the proposed Regulation. At the conclusion of the public workshops, the Division began the promulgation of proposed Amendments.

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.* § 6010(a) and 7 *Del.C.* Chapter 74, *Delaware Underground Storage Tank Act*. The Department published its initial proposed Amendments in the August 1, 2023, *Delaware Register of Regulations*. Subsequently, the Department revised the initial proposed amendments and vetted the revision through an Errata, marked as Exhibit 16, at the time of the virtual hearing held on August 30, 2023.

There were 18 members of the public attended the virtual public hearing held on August 30, 2023. 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 the close of business on September 14, 2023, 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 comment received from the public and will be discussed in further detail below.

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) twenty (20) documents introduced by Department staff at the public hearing held on August 30, 2023 and marked by this Hearing Officer at the time of the hearing accordingly as Department Exhibits 1- 20; and (3) a Technical Response Memorandum ("TRM") from Eileen Butler, Planner V, 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, Mrs. Butler, 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. The Division of Waste and Hazardous Substances inquired with the commenter for clarity on the comment, during which time the Division concluded that the nature of the comment did not pertain to the Department's proposed *revised* Amendments. The details of the comment and the response are attached, hereto as Appendix "B".

The Department's proposed *revised* Amendments, as set forth above, and the Department's TRM, dated September 20, 2023, 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.* § 6010(a) and 7 *Del.C.* Chapter 74;
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 August 30, 2023, and during the 15 days subsequent to the hearing (through September 14, 2023), in order to consider all public comment on the same before making any final decision;
4. Promulgation of the proposed *revised* Amendments to 7 DE Admin. Code 1351: *Underground Storage Tank Systems* will enable the Department to amend regulatory requirements for owners/operators of underground storage tanks to (1) improve clarity for the regulated community, and (2) incorporate by reference three documents (Delaware Risk-Based Corrective Action Protocol, Volume 2; Hydrogeologic Investigative Guidance, Volume 2; and Vapor Intrusion Guidance);
5. The Department has reviewed the proposed *revised* 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. The Department analyzed that the proposed amendment to the term “tank”, defined as “each compartment considered as a tank”, will impose additional annual fees for 14% of the current regulated community that own and operate underground storage tanks that have are compartmentalized tanks however, it will not establish reporting requirements, and the recommendations as proposed should be applicable to all Delaware individuals or small businesses equally;

6. The Department's proposed regulatory Amendments, as initially published in the August 1, 2023 *Delaware Register of Regulations*, and then non-substantively revised and fully vetted to the public at the aforementioned public hearing held on August 30, 2023, 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, the proposed *revised* Amendments should be approved as final regulatory Amendments, which shall go into effect twenty 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 *revised* Amendments as final revised 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/Theresa Smith
THERESA SMITH
Regulatory Specialist

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Attachments:

Appendix A: Proposed *Revised* UST Reg. Amendments

Appendix B: TRM dated September 20, 2023