

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 1352: *Aboveground Storage Tanks***

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 1352: *Aboveground Storage Tanks* (“Regulations”). The Department is proposing to amend regulatory requirements for owners/operators of aboveground storage tanks (“AST”) to improve clarity for the regulated community and incorporate by reference three documents: the *Delaware Risk-Based Corrective Action Protocol* (“DERBCAP”), *Volume 2*; the *Hydrogeologic Investigation Guide* (“HIG”), *Volume 2*; and the *Vapor Intrusion Guidance* (“VIG”).)

In accordance with 7 Del.C. Chapter 74A, *The Jeffrey Davis Aboveground Storage Tank Act*, the Department has the authority to regulate the installation, operation, retrofitting, and abandonment of ASTs, with the goal to prevent and detect leaks in the tanks and ultimately to protect human health, safety, and the environment. The Regulations identify corrective action protocols when AST leaks occur, known as a Release. A “Release” is overfilling, leaking, emitting, discharging, escaping, leaching, or disposing of a regulated substance into groundwater, surface water, air, or soil. In the event of a Release, the Department references the DERBCAP.

The Department developed the DERBCAP with the assistance of the American Society for Testing and Materials (“ASTM”), the Partners in Risk-based Corrective Action Implementation, the Hazardous Substance Cleanup Act Advisory Committee, and the Underground Storage Tank Advisory Committee. The Department established *DERBCAP Volume 1* in January 2000 as guidance for owners and operators of ASTs and underground storage tanks, to perform site assessments such as soil screening, cleanup measures, and corrective actions at petroleum tank Release sites.

In January 2023, the Department updated DERBCAP in *Volume 2*. The newest version amends definitions and references and updates the risk-based screening levels to the standards established in ASTM's *E 1739-95 (2015) Standard Guide for Risk-Based Corrective Action at Petroleum Release Sites*.

The DERBCAP is accessible for owners and operators as a source of guidance however the content of the document is not enforceable through regulatory authority. The Department recognized that there was a need to strengthen and provide clear regulatory standards for the identification and remediation of AST Releases outlined in the DERBCAP. As a result, the Department is proposing to incorporate by reference, the *DERBCAP Volume 2* into the Regulation. Furthermore, the DERBCAP references the *HIG, Volume 2*; and *VIG*. To ensure comprehensive inclusion through referencing, the Department is also proposing to incorporate by reference the *HIG, Volume 2*, and the *VIG* into the Regulation.

The *HIG Volume 2* is a document to assist consultants, responsible parties, and the public with the requirements established in Part E §5.0 of the Regulation- *Leak Reporting And Corrective Action Requirements For Aboveground Storage Tanks*. 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 adding the documents by reference in the proposed Regulations, the Department is proposing revisions to comply with Delaware's regulatory style manual and for clarity purposes. Throughout the Regulation, the Department proposes minor revisions that include changing numbers from a text format to a numerical format, requirements for Tier 0 exemption, amending and defining language terms for clarity, and adding definitions from the Statute for ease of reference in the Regulation. More specifically, the Department is proposing to amend the definition of "Aboveground Storage Tanks". Currently the compartmentalized AST is considered as one AST, and the proposed revision entails that each compartment will be considered a single AST as it pertains to compliance of the Regulation. Additional terms have also been defined for clarity, such as Best Management Practices, DERBCAP, Fiduciary, Foreclosure, *HIG*, Imminent threat of a release, Lender, Repair, Responsible Party, Security interest, and Tier 0.

The Department is also proposing to remove Part B, Section 14.0, *Site Assessment Requirement* of the Regulation. The sampling language from Section 14.0 has been added to appropriate sections throughout the Regulation and other language requirements of this section were included in the *DERBCAP, Volume 2*.

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 1352: *Aboveground Storage Tanks*, pursuant to 7 *Del.C.* § 6010(a) and 74A, *The Jeffery Davis Aboveground 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. It should be noted that the revised Amendments do not constitute a significant alteration to what was initially proposed, therefore no further public notification or commentary is required by the Department.

There were 18 members of the public who 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.

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 *revised* Amendments, Ms. 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 Department's proposed *revised* Amendments 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 *revised* amendments to 7 DE Admin. Code 1352: *Aboveground Storage Tanks*, 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 1352: *Aboveground Storage Tanks*, pursuant to 7 *Del.C.* § 6010(a) and 7 *Del.C.* Chapter 74A;
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; Promulgation of the proposed *revised* Amendments to 7 DE Admin. Code 1352: *Aboveground Storage Tanks* 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 Investigation Guide, Volume 2; and Vapor Intrusion Guidance*);

4. 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 1% of the current regulated community that owns and operates aboveground storage tanks that have 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;
5. 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*;
6. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
7. 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* AST Reg. Amendments

Appendix B: TRM dated September 20, 2023

