



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

RICHARDSON & ROBBINS BUILDING
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

PHONE
(302) 739-9000

Secretary's Order No.: 2023-WH-0033

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 1352:
Aboveground Storage Tanks**

Date of Issuance: December 11, 2023

Effective Date of the Amendment: January 11, 2024

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 ("Amendments") to 7 DE Admin. Code 1352: *Aboveground Storage Tanks* ("Regulation"). Pursuant to 7 *Del.C.* Chapter 74A, the Department is amending the Regulation to improve clarity for owners/operators of aboveground storage tanks ("AST") 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").

The existing Regulation outlines corrective action protocols for the regulated community in the event of an AST leak, referred to 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. When a Release occurs, the Department refers to the DERBCAP as guidance.

The Department established the DERBCAP Volume 1 in January 2000 as guidance for owners and operators of ASTs for soil screening, cleanup measures, and corrective actions at petroleum tank Release sites. In January 2023, the Department updated DERBCAP in Volume 2. The latest version modifies definitions and references, as well as updates the risk-based screening levels to the standards established in the American Society for Testing and Materials' *E 1739-95 (2015) Standard Guide for Risk-Based Corrective Action at Petroleum Release Sites*. While the DERBCAP is used for guidance by the Department, it is not enforceable by regulatory authority.

The Department recognized the necessity to strengthen and establish regulatory standards for the identification and remediation of AST Releases outlined in the DERBCAP and is incorporating by reference, the *DERBCAP Volume 2* into the Regulation. Additionally, the DERBCAP references the *HIG, Volume 2*; and *VIG*. To ensure a comprehensive inclusion through cross-referencing, the Department is also incorporating 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 §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 incorporating by reference the three documents, the Department is revising language throughout the Regulation. In alignment with Delaware's regulatory style manual, the Department is converting numbers written as a word to numerical digits. The Department also added provisions under "Tier 0 Investigative Exemption". While the DERBCAP outlines Tier 0 sampling requirements, the Department has incorporated specific criteria for owners and operators of ASTs to request exemptions of Tier 0 sampling and analysis.

The Department has also modified and added terms for clarity purposes. The definition of “Aboveground Storage Tank” has been revised to mean each compartment will be considered an individual AST. Currently, regardless of the number compartments, an AST is considered a single entity. 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 removing Part B, Section 14.0, *Site Assessment Requirement* and consolidating the language within the Regulation. More specifically, the sampling language from Section 14.0 has been added to appropriate sections throughout the Regulation and other language requirements of this section are included in the *DERBCAP, Volume 2*.

The Amendments allow the Department to enforce the measures outlined in the DERBCAP with the goal to prevent and detect a Release in ASTs, and execute protocols specified in the HIG and the VIG. Moreover, the Amendments enhance clarity of the Regulation for the regulated community and ultimately protect human health, safety and the environment.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these Amendments, pursuant to 7 *Del.C.* §§6010(a) and 7 *Del.C.* Chapter 74A. The Department published its initial proposed regulation Amendments in the August 1, 2023, *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on August 30, 2023. All notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

It should be noted that after publication in the August 1, 2023, *Delaware Register of Regulations*, the Department made additional non-substantive revisions to the initial proposed Amendments (Department’s Exhibit 7). The revisions, as set forth in the proposed *revised* Amendments, were properly vetted by the Department at the time of the virtual hearing and 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 eighteen (18) members of the public in attendance at the virtual public hearing. Pursuant to 29 *Del.C.* §10118(a), the hearing record remained open for receipt of additional written comment for 15 days following the public hearing. The hearing record formally closed for comment in this matter at close of business on September 14, 2023, with one (1) written comment having been received by the Department.

Following the close of the Record with regard to public comment, and at the request of the Hearing Officer, a Technical Response Memorandum (“TRM”) was provided by the Department’s staff in the Division of Waste and Hazardous Substances and details the comment and response, in the same. Hearing Officer Theresa Smith prepared her report dated December 1, 2023 (“Report”), which expressly incorporated the Department’s proposed *revised* Amendments into the hearing 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 in the Division of Waste and Hazardous Substances, and established by the Hearing Officer’s Report, I find that the regulatory Amendments to 7 DE Admin. Code 1352, *Above Storage Tanks*, are well-supported. I further find that the Department’s Waste and Hazardous Substances experts fully developed the record to support adoption of these proposed *revised* Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the Amendments be promulgated as final.

The following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del. C.* §§6010(a) 7 *Del.C.* Chapter 74A;
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, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on August 30, 2023, and during the 15 days subsequent to the hearing (through September 14, 2023), before making any final decision;
4. 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 aboveground 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;

5. The Department has reviewed the proposed *revised* Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Chapter 104, and believes the same to be lawful, feasible, and desirable. It was determined 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. It was also determined that the proposed amendment will not establish reporting requirements, and that the recommendations as proposed should be applicable to all Delaware individuals or small businesses equally;
6. The Department’s Hearing Officer’s Report, including its established record and the recommended proposed *revised* Amendments as set forth 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, 2023, *Delaware Register of Regulations*, and then subsequently *revised*, 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 are 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 this Order approving the proposed *revised* Amendments as final regulations 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.
9. The Department shall serve and publish its Order on its internet site.


For Shawn M. Garvin
Secretary