

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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FEB 15 PM 3:44
OFFICE OF THE SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: WV Department of Natural Resources TITLE NUMBER: 47

CITE AUTHORITY W. Va. Code §20-5H-6

AMENDMENT TO AN EXISTING RULE: YES ___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 36

TITLE OF RULE BEING PROPOSED: _____

"Underground Storage Tank Regulations"

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

J. Edward Hamrick

OFFICE OF THE SECRETARY OF STATE
WEST VIRGINIA

FEB 17 PM 3:44

FILED

FISCAL NOTE FOR PROPOSED RULES

FILED

Rule Title: Underground Storage Tank Regulations 1988 DEC 16 PM 12:37

Type of Rule: X Legislative Interpretive Procedural
SECRETARY OF STATE

Agency: West Virginia Department of Natural Resources

Address: Building 3, State Capitol Complex, Charleston, West Virginia

1. Effect of Proposed Rule (Estimated Total Cost)	Increase \$	ANNUAL		FISCAL YEAR	
		Decrease \$	Current \$	Next \$	Thereafter \$
Personal Services	181,257			183,500	367,000
Current Expense	16,635			25,000	60,000
Repairs and Alterations	8,300			12,000	18,000
Equipment	52,275			40,000	60,000
Other	8,200			10,000	15,000

2. Explanation of Above Estimates:

An expenditure of \$266,667 is required to implement these rules in the first year, 75% of which will be federal funds. By its fourth year, given federal grant monies and fee assessments collected from each tank owner in the State, this program will be self-funding.

3. Objectives of These Rules:

These rules adopt federal regulations that establish technical requirements for underground storage tanks containing certain regulated substances, particularly petroleum.


4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government: See above estimates.

B. Economic Impact on Political Subdivisions: See attachment.
 Economic Impact on Specific Industries: See attachment.
 Economic Impact on Specific Groups of Citizens: No impact.

C. Economic Impact on Citizens/Public at Large: See attachment.

Date: December 16, 1988



 Ronald R. Potesta
 Director

The Legislature has recognized that large quantities of petroleum and hazardous substances are stored in underground storage tanks within the State of West Virginia and that emergency situations involving these substances can and will arise which may present a hazard to human health and safety, decrease property values, and/or contaminate groundwater and the environment. Therefore, they desire to produce revenue for matching federal assistance, to create a program to control the installation, operation, and abandonment of underground storage tanks, and to provide for corrective action to remedy releases of regulated substances from these tanks. No additional taxes will be required from the public at large to produce this revenue as it is supported by annual fees collected from the tank owners and from federal assistance. The industry should not be adversely affected as the fees shall not exceed fifty dollars per tank per year.

DATE: February 17, 1989

FILED

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

1989 FEB 15 PM 3:44

FROM: West Virginia Department of Natural Resources

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

LEGISLATIVE RULE TITLE: Underground Storage Tank Regulations

1. Authorizing statute(s) citation:

West Virginia Code Chapter 20, Article 5H, Section 6

2. a. Date filed in State Register with Notice of Hearing:

December 16, 1988

b. What other notice, including advertising, did you give of the public hearing?

An official Department News Release was sent to all West Virginia newspapers and radio and television stations.

c. Date(s) of hearing(s): January 20, 1989

d. Attach list of persons who appeared at the hearing, comments received, amendments to the proposed rule, and the reasons for those amendments.

Attached X No comments received

The comments received and the Department's responses appear in the Response to Comments filed with the agency-approved proposed Legislative Rule.

e. Date you filed in State Register the agency-approved proposed Legislative Rule following public hearing:

February 17, 1989

f. Name and phone number of agency person to contact for additional information:

Mr. Dennis H. Treacy, Administrator
Office of Environmental & Regulatory Affairs
348-2754

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

NOT APPLICABLE

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

- b. Date of hearing: _____

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

- d. Attach findings and determinations and reasons:

**PREAMBLE TO A NEW LEGISLATIVE RULE CONCERNING
THE REGULATION OF UNDERGROUND STORAGE TANKS**

STATE AGENCY: West Virginia Department of Natural Resources

REGULATIONS: 47 C.S.R. 36, "Underground Storage Tank Regulations"

AUTHORITY: W. Va. Code §20-5H-6

ACTION: Agency-Approved Rule

SUMMARY: The Department is approving a new legislative rule to provide technical requirements to govern the construction, installation, upgrading, use, maintenance, and closure of underground storage tanks (USTs) in West Virginia. This rule, in large measure, adopts federal UST regulations by reference. In this manner the State's regulations will be consistent and equivalent with and no more stringent than federal regulations, thus fulfilling the Department's mandate under the 1988 West Virginia Underground Storage Tank Act. The federal regulations being adopted by reference appear in the Federal Register at the following citations: 53 F.R. 37194-37212 (September 23, 1988), 53 F.R. 43370-43382 (October 26, 1988), and 53 F.R. 51273-51274 (December 21, 1988).

RESPONSE TO COMMENTS: A public hearing on the proposed rule was held on January 20, 1989 in Charleston and written comments were received by the Department until 4:30 p.m. on that day. Six individuals attended the public hearing and oral or written comments were received from four parties. Two commenters expressed strong support for the Department's decision to adopt federal UST regulations by reference. The other comments received and the Department's responses appear below:

Comment: One commenter noted that the Department did not in fact accomplish its stated intention to adopt federal UST regulations by reference. The preamble to its proposal stated that the Department sought to adopt federal regulations that appeared in the Federal Register on September 23, 1988 and October 26, 1988 and, to accomplish this adoption, Section 2.1 of the Department's proposed regulations set the date of incorporation as "the date on which these regulations were proposed (December 16, 1988)." However, the September 23rd regulations did not become effective until December 22, 1988 and the October 26th regulations did not become effective until January 24, 1989. Therefore, in order to incorporate the regulations that appeared in the Federal Register on the dates specified, the Department must set the date of incorporation on January 24, 1989 rather than December 16, 1988.

Response: The Department concurs with the commenter's suggestion and has modified the date of incorporation accordingly.

Comment: One commenter asked that the Department adopt an exclusion from regulation for tanks containing *de minimus* concentrations of regulated substances.

Response: The exclusion mentioned by the commenter appears in the federal UST regulations of September 23, 1988 (see 53 F.R. 37195) as 40 C.F.R. 280.10(b)(5) and, therefore, has already been adopted by reference in the Department's regulations.

* * * * *

Comment: One commenter asked that the Department adopt the following exclusion from regulation:

These regulations shall not apply to UST systems which are closed or abandoned on sites acquired by the West Virginia Department of Highways for its own use or for purposes of constructing public roads, or other public structures, provided that the owner or last previous operator of such UST system certifies in writing to the Department of Natural Resources that the UST system was cleaned and evacuated by the owner of such tank immediately prior to the acquisition of the site by the West Virginia Department of Highways where such UST system is located.

Response: The Department cannot grant the commenter's request. The Department does not believe that the proper statutory authority exists to allow the creation of such an exemption from regulation, and all attendant liabilities, based solely upon the "certification" suggested by the commenter. In addition, the intent of the West Virginia Underground Storage Tank Act is for the Department to assume regulatory primacy to administer a federally-sanctioned state UST program. To grant a special exemption from regulation to the State Department of Highways would result in a federal denial of state primacy and the withdrawal of federal monetary assistance to the Department's program.

* * * * *

Comment: One commenter asked that the Department add a definitional section to the regulations based upon the definitions that appear in the West Virginia Underground Storage Tank Act. In particular, the commenter noted that the term "change in status" is defined in the State Act but not in these regulations.

Response: The federal regulations being adopted by reference already contain a definitional section (40 C.F.R. 280.12); the addition of a separate definitional section in the Department's regulations would be superfluous and potentially confusing. Furthermore, the definitions in the State Act were based upon the

federal definitions that appear in 40 C.F.R. 280.12 and, in most cases, those definitions were adopted verbatim. However, as the commenter noted, the term "change in status" in the State Act does not appear in the federal regulations. Therefore, the Department has added a new Section 4.6.1 to these regulations in order to provide a definition of "change in status" identical to the definition that appears in the State Act.

* * * * *

Comment: One commenter questioned the use of the phrase "of these regulations" in references to sections of the federal regulations that have been adopted by reference in the Department's regulations. The commenter stated: "While we recognize once the federal regulations are incorporated by reference into the State regulations, they become the State regulations, we believe the use of the descriptive phrase 'of these regulations' is too literal in a citation to a federal regulation." The commenter suggested that the Department retain the full federal citation when making such references.

Response: The Department concurs with the commenter's suggestion and has modified such references accordingly.

* * * * *

Comment: One commenter asked that the Department delete Section 2.1.6 from the proposed regulations. This section would substitute Section 14 of the State Act for federal language regarding corrective action for underground storage tanks. The commenter presented the following argument:

The cross-reference to the RCRA corrective action program in the federal regulations avoids creating a duplicative regulatory structure with respect to UST systems. Under RCRA, any facility which has a hazardous waste permit issued under Subtitle C of the statute must perform an evaluation of all releases from solid waste management units at the facility. This evaluation would extend to underground storage tanks and, if a release is determined to have occurred, RCRA would require the submission of a corrective action plan and, upon approval, the implementation of such a plan.

This provision of the federal RCRA program is currently applicable to facilities in West Virginia. Therefore, by changing the cross-reference as proposed in Section 2.1.6, the regulations would be imposing an additional requirement for corrective action that would come under the UST program, in addition to the counterpart requirement of the RCRA program. It is unnecessary to address such releases under both programs. We also

believe that the proposed language in Section 2.1.6 would be contrary to the prohibition against more stringent regulations contained in the State Act. For these reasons, we urge that Section 2.1.6 be deleted in the final regulations.

Response: The Department concurs with the commenter's suggestion and has modified the regulations accordingly.

* * * * *

Comment: One commenter asked that the Department revise Section 4.5 of the proposed regulations, which required a person selling an underground storage tank after June 10, 1988 to provide notification of the transfer of ownership to the Director of the Department of Natural Resources. The commenter stated:

Because it is effective "beginning June 10, 1988," and because it requires the seller to notify the purchaser of the purchaser's obligations "under Section 4 of these regulations," when the regulations were not in existence on June 10, 1988, compliance with the proposed rule is not feasible. We recognize that the State Act creates an independent obligation with respect to notifications of tank transfers in W. Va. Code §20-5H-8(b). However, we believe that the form of the notification required under the regulations can only become effective as of the effective date of the regulations. Therefore, we urge that the reference to "June 10, 1988" be replaced by the phrase "with the effective date of these regulations," and that the following be added at the end of Section 4.5:

Note: The West Virginia Underground Storage Tank Act requires notification of tank transfers. W. Va. Code §20-5H-8. The Act and this section became effective on June 10, 1988.

Response: The Department concurs with the first part of the commenter's suggestion and has replaced "June 10, 1988" with the phrase "on the effective date of these regulations." However, the note that appears in the Department's proposed regulations parallels federal regulatory provisions more accurately than does the commenter's suggested note; therefore, the second part of the commenter's suggestion is rejected.

* * * * *

Comment: One commenter asked that the Department modify Section 4.6 of the proposed regulations in order to accommodate a change in status made near the end of any calendar year. Specifically, the commenter recommended that the reporting deadline be changed

from December 31 of the year in which a change in status occurred to January 31 of the following year.

Response: The Department agrees with the commenter that UST owners or operators should have adequate time in which to report a late-year change in status. Therefore, to assure equal treatment to all members of the regulated community, the Department has modified the reporting deadline in Section 4.6 to parallel the deadline set for a notification of a transfer of UST ownership: thirty days.

§47-36-1. General.

1.1. Scope and Purpose. -- This legislative rule establishes regulations to govern the construction, installation, upgrading, use, maintenance, and closure of underground storage tanks in this State.

1.2. Authority. -- W. Va. Code §20-5H-6.

1.3. Filing Date. --

1.4. Effective Date. --

§47-36-2. Adoption of Federal Regulations.

2.1. The director hereby adopts and incorporates by reference the provisions contained in 40 C.F.R. Part 280 as published in the Code of Federal Regulations on ~~the date on which these regulations were proposed (December 16, 1988)~~ January 24, 1989, with the following modifications:

2.1.1. The definition of "Implementing agency" that appears in 40 C.F.R. §280.12 shall be deleted and replaced by "'Implementing agency' means the West Virginia Department of Natural Resources."

2.1.2. The provisions contained in 40 C.F.R. §280.20(e) shall be deleted and replaced by Section 3 of these regulations.

2.1.3. The provisions contained in 40 C.F.R. §280.22 shall be deleted and replaced by Section 4 of these regulations.

2.1.4. The phrase "section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended" that appears in 40 C.F.R. §280.34 shall be deleted and replaced by the phrase "W. Va. Code §20-5H-13."

2.1.5. The provisions contained in 40 C.F.R. §280.34(a)(1) shall be deleted and replaced by "(1) Notification in accordance with the provisions of Section 4 of these regulations."

~~2.1.6. The phrase "section 3005(u) of the Resource Conservation and Recovery Act, as amended" that appears in~~

~~40--C.F.R.---§280.60--shall--be--deleted--and--replaced--by--the--phrase
"W--Va--Code--§20-5H-14."~~

~~2-1-77~~ 2.1.6. The provisions contained in Appendices II and III of 40 C.F.R. Part 280 shall be deleted.

§47-36-3. Certification Requirements. (Reserved).

§47-36-4. Notification Requirements.

4.1. Except as provided in Section 4.1.1, 4.1.2, or 4.1.3 of these regulations, the owner or operator of an underground storage tank system that was in the ground prior to the effective date of these regulations must submit a notice of the existence of such tank system to the director by completing Sections I through VI of the form prescribed in Appendix I of these regulations.

4.1.1. The owner or operator of an underground storage tank system that was in the ground prior to the effective date of these regulations is exempt from the notification requirements of Section 4.1 of these regulations if notice was previously given to the director in accordance with the provisions of the federal Hazardous and Solid Waste Amendments of 1984 on the form published in the Federal Register on November 8, 1985 (50 F.R. 46602), unless such notice was given pursuant to Section 103(c) of CERCLA.

4.1.2. The owner or operator of an underground storage tank system that was taken out of operation on or before January 1, 1974 is exempt from the notification requirements of Section 4.1 of these regulations.

4.1.3. The owner or operator of an underground storage tank that was installed after December 22, 1988 must submit a notice of the existence of that tank to the director by completing Sections I through VII of the form prescribed in Appendix I of these regulations.

4.2. All owners and operators of new UST systems must provide notification to the director in accordance with the provisions of Section 4.1.3 of these regulations. In addition, such owners and operators must certify, in the notification form, compliance with the following requirements:

4.2.1. Installation of tanks and piping in accordance with the provisions of Section 3 of these regulations;

4.2.2. Cathodic protection of steel tanks and piping in accordance with the provisions ~~of Sections 280.20(a) and 280.20(b) of these regulations~~ contained in 40 C.F.R. §§280.20(a) and 280.20(b);

4.2.3. Financial responsibility in accordance with the

provisions of Subpart H of these regulations contained in Subpart H of 40 C.F.R. Part 280; and

4.2.4. Release detection in accordance with the provisions of Sections 280.41 and 280.42 of these regulations contained in 40 C.F.R. §§280.41 and 280.42.

4.3. All owners and operators of new UST systems must ensure that the installer certifies, in the notification form, that the methods used to install the tanks and piping comply with the requirements in Section 280.20(d) of these regulations contained in 40 C.F.R. §280.20(d).

4.4. An owner or operator who is required to submit notices under Section 4 of these regulations may provide notice for several tanks by using one notification form, but an owner of tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

4.5. ~~Beginning June 10, 1988~~ Beginning on the effective date of these regulations, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under Section 4 of these regulations. The following notice may be used to comply with this requirement:

"NOTICE: Owners of certain underground storage tanks in West Virginia are required by law to notify the director of the West Virginia Department of Natural Resources of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986 must be made within thirty (30) days. Consult the Department's Underground Storage Tank Regulations (47 C.S.R. 36) to determine if you must provide this notification."

4.6. Except as provided in ~~Section 4.6.1~~ Section 4.7 of these regulations, the owner or operator must report changes in the status of any underground storage tank system by completing Sections I through VI of the form prescribed in Appendix I of these regulations and then submitting that form to the director by ~~December 31 of the year in which the change of status occurred~~ within thirty (30) days of the change of status.

4.6.1. As used in Section 4.6 of these regulations, "change of status" means causing an underground storage tank to be no longer in use or a change in the reported uses, contents, or ownership of an underground storage tank.

~~4.6.1~~ 4.7. A new owner of an underground storage tank must provide notification of the transfer of ownership of that tank by completing Sections I through VI of the form prescribed in Appendix I of these regulations and then submitting that form to the director within thirty (30) days of the transfer.