UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Via electronic filing December 10, 2015

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave. NW
Washington, DC 20460

Re: In the Matter of: Aylin, Inc., et al (Docket No. RCRA-03-2013-0039)

Dear Ms. Anderson:

Please find enclosed a copy of Complainant's Motion for Leave to File Supplemental Prehearing Exchange. The exhibits attached hereto are identical to those Complainant submitted electronically on November 21, 2015, but apparently omitted the motion seeking leave of the Court to supplement. All of the exhibits were included on the disk mailed to you and Respondents' counsel previously. Thank you in advance.

Sincerely,

Janet E. Sharke
Senior Assistant Regional Counsel (3RC50)
sharke.janet@epa.gov
215-814-2689

cc: Jeffrey Leiter, Esq., Counsel for Respondents

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	)	**Docket No. RCRA-03-2013-0039**
	)	
Aylin, Inc., Rt. 58 Food Mart, Inc., Franklin Eagle Mart Corp., Adnan Kiriscioglu, 5703 Holland Road Realty Corp., 8917 South Quay Road Realty Corp., and 1397 Carrsville Highway Realty Corp.	)	**Proceeding Under Section 9006 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6991e**
	)	
Respondents.	)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PREHEARING EXCHANGE

In accordance with the Presiding Officer's Prehearing Order of November 5, 2013, and consistent with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/ Termination or Suspension of Permits* ("*Consolidated Rules of Practice*"), 40 C.F.R. Part 22, Complainant moves for leave to supplement its Initial, Rebuttal and Second Supplemental Prehearing Exchanges.

Complainant proposes to add six exhibits denoted as CX 149-154 that were not included with its prior prehearing submittals. Consistent with 40 C.F.R. § 22.19(f), Complainant seeks to promptly supplement its prior exchange of information because such information is either incomplete and/or inaccurate and has not otherwise been disclosed to Respondents pursuant to the Rules governing this proceeding.

In the present instance, Complainant is providing the documents well in advance of any hearing. Complainant submits that each proposed exhibit contains information that is relevant and material to matters at issue in this proceeding and that such information is not unduly repetitious, unreliable, or of little probative value and is therefore admissible pursuant to 40 C.F.R. § 22.22(a).

The six exhibits Complainant seeks to include are:

Record of Judgement against Adnan Kiriscioglu dated 8/26/13;

Fed. Register Vol. 60, No. 173; Re USTS (9/7/95);

VADEQ Guidance Document (7/15/14);

Letter to Russell Ellison, VADEQ, from Carol Amend, EPA dated Feb. 12, 2015;

Email to Andrew Ma from David Kinsey VADEQ (8/17/12); and

VADEQ Guidance Document 01-2024, Amendment #1.

Complainant respectfully requests, by and through this motion, this Court's leave to supplement Complainant's prior prehearing submissions with the exhibits attached hereto. These exhibits are identical to those Complainant attempted to file on November 21, 2015, but apparently omitted the motion, notwithstanding the statement to the contrary in the cover letter. Such motion was prepared but apparently not scanned and hence not included in the electronic submission. Based on recent communications, the undersigned understands that Respondents' counsel intends to file a partial objection to this motion. Finally, Complainant respectfully reserves the right to further supplement its prehearing exchange in accordance with this Court's Prehearing Order and the *Consolidated Rules of Practice*.

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that this Court issue an Order granting Complainant's Motion for Leave to File Supplemental Prehearing Exchange.

Respectfully submitted,

12/10/2015
Date

Janet E. Sharke
Louis F. Ramalho
Senior Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

COMPLAINANT'S SUPPLEMENTAL PREHEARING EXCHANGE INDEX

CX 149	Lexis Public Records for Holland Food Mart/Kiriscioglu, Adnan re: lien/judgement (8/26/13)	EPA 2396
CX 150	Federal Register Vol. 60, No. 173 re: Underground Storage Tanks - Lender Liability (09/07/95)	EPA 2397-2436
CX 151	VADEQ Guidance Document LPR-SRR-2014-02 Storage Tank Program Compliance Manual Volume 4: Compliance Process (07/15/14)	EPA 2437-2493
CX 152	Letter to Russell Ellison (VADEQ UST Coordinator) from Carol Amend (EPA) re: RCRA Proposed Amended Complainant, Compliance Order and Notice of Opportunity for Hearing (02/12/15)	EPA 2494
CX 153	Email to Andrew Ma from David Kinsey (VADEQ) re: Inspection Documents (08/17/12) (attachments)	EPA 2495-2501
CX 154	VADEQ Guidance Document 01-2024, Amendment #1, Clarification of Statistical Inventory Reconciliation (SIR) Release Detection Guidance for Underground Storage Tanks	EPA 2502-2503

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Search: Public Records > Bankruptcy, Judgments & Liens > Search Results

Terms: last-name(**Kiriscioglu**) first-name(**Adnan**) company(**Holland Food Mart**) case number(... (Edit Search | New Search)

Select for Delivery or View Checked

No.	Type	Debtor	Address	Details	Creditor
		View Source Documents	Click for Additional Searches		
1.	Lien/Judge	HOLLAND FOOD MART	29 WATERVIEW DR PORT JEFFERSON, NY 11777-1169 SUFFOLK COUNTY	Filing Date: 8/26/2013 Amount: $18,525 CIVIL JUDGMENT Filing Number: 1361537 Original Filing Date: 8/26/2013 Filing Office: SUFFOLK COUNTY SUPREME COURT - RIVERHEAD, NY	CROSSROADS FUEL SERVICE INC
		KIRISCIOGLU, ADNAN LexID(sm): 001400068266	29 WATERVIEW DR PORT JEFFERSON, NY 11777-1169 SUFFOLK COUNTY		

Search: Public Records > Bankruptcy, Judgments & Liens > Search Results

Terms: last-name(**Kiriscioglu**) first-name(**Adnan**) company(**Holland Food Mart**) case number(... (Edit Search | New Search)

Date/Time: Wednesday, November 18, 2015 2:07 PM

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CX 149

EPA 2396

FEDERAL REGISTER

Vol. 60, No. 173

Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY (EPA)

40 CFR Parts 280 and 281

[FRL-5292-1]

RIN 2050-AD67

Underground Storage Tanks--Lender Liability

Part II

60 FR 46692

DATE: Thursday, September 7, 1995

ACTION: Final rule.

[*46692]

SUMMARY: The Environmental Protection Agency (EPA) is issuing this rule under the Resource Conservation and Recovery Act (RCRA), Subtitle I-Regulation of Underground Storage Tanks. This rule limits the regulatory obligations of lending institutions and other persons who hold a security interest in a petroleum underground storage tank (UST) or in real estate containing a petroleum underground storage tank, or that acquire title or deed to a petroleum UST or facility or property on which an UST is located. This final rule specifies conditions under which these "security interest holders" may be exempted from the RCRA Subtitle I corrective action, technical, and financial responsibility regulatory requirements that apply to an UST owner and operator. This rule should result in additional capital availability for UST owners, many of whom are small businesses, and will assist them in meeting environmental requirements by improving their facilities.

EFFECTIVE DATE: This rule is effective December 6, 1995.

ADDRESSES: The official record for this rulemaking, Docket Number UST 3-18, is located in the UST Docket, room M2616 of the U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC. The docket is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Docket materials, including a comprehensive document containing EPA's response to comments received on the proposed rule, may be reviewed by appointment by calling (202) 260-9720. Copies of docket materials may be made at a cost of $ 0.15 per page. The mailing address is U.S. Environmental Protection Agency, OUST Docket (5305), 401 M Street, SW., Washington, DC 20460. Please note that EPA is planning to relocate the UST Docket to Arlington, VA during September 1995. You may call (202) 260-9720 for up-to-date information on access to the docket.

FOR FURTHER INFORMATION CONTACT: For further information about this rule, contact the RCRA/Superfund Hotline, U.S. Environmental Protection Agency, Washington, DC. 20460, (800) 424-9346 (toll-free) or (703) 412-9810 (local). For the hearing impaired, the number is (800) 553-7672 (toll-free), or (703) 412-3323 (local). For technical information on this rule, contact John Heffelfinger in the EPA Office of Underground Storage Tanks at (703) 308-8881.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

D. Unfunded Mandates Reform Act

I. Background

EPA is establishing regulatory criteria specifying which RCRA Subtitle I requirements are applicable to a secured creditor. Section 9003(h)(9) of RCRA exempts from the definition of "owner," for purposes of § 9003(h)- EPA Response Program for Petroleum, those persons who, without participating in the management of the UST or UST system, and who are not otherwise engaged in petroleum production, refining, and marketing, maintain indicia of ownership in an UST or UST system primarily to protect a security interest. Those most affected by this "security interest exemption" include private lending institutions or other persons that provide loans secured by real estate containing an UST or UST system, or that acquire title to, or other indicia of ownership in, a contaminated UST or UST system. n1 However, the security interest exemption is not limited solely to lending institutions; it potentially applies to any person whose indicia of ownership in an UST or UST system is maintained primarily to protect a security interest.

n1 Under the laws of some states, an interest in real property may include an interest in USTs or UST systems located on that property. See Sunnybrook Realty Co. Inc. v. State of New York, Kesbec, Inc. v. State of New York, Claim Nos. 32844, 33125, 15 Misc. 2d 739; 182 N.Y.S. 2d 983. Of course, the loan documents may specifically include or exclude USTs as collateral securing the obligation.

The RCRA Subtitle I security interest exemption affects not only secured creditors but also UST and UST system owners who seek capital through the private lending market. Today's rule provides a regulatory exemption from the federal UST regulatory requirements for those persons who provide secured financing to UST and UST system owners. EPA expects this rule, in conjunction with the statutory exemption in § 9003(h)(9), to encourage the extension of credit to credit-worthy UST owners. Until now, EPA believes that concerns over environmental liability have made a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of USTs. The free flow of credit to UST owners (many of whom are small entities that may rely on secured financing mechanisms for capital) is expected to assist UST owners in meeting their obligations to upgrade, maintain, or otherwise comply with RCRA Subtitle I and other environmental requirements. Conversely, the lack of such capital may adversely affect the ability of an UST owner to meet its obligations under Subtitle I, with concomitant adverse environmental impacts from USTs and [*46693] UST systems that are out of compliance due to the lack of financing to make the necessary improvements.

The Agency is also concerned that if otherwise credit-worthy UST owners and operators are unable to obtain financing to perform leak detection tests, or to upgrade or replace deficient tanks, the market for UST equipment could be adversely affected, thereby limiting the availability and/or affecting the cost of such equipment. In addition, a lack of adequate capital could produce a ripple effect which would cut across other portions of the UST-related industrial sector for equipment and services. For example, based on letters received from UST equipment manufacturers, EPA believes that this sector has suffered as a direct result of the capital squeeze on UST owners and operators. The Agency is further concerned that many UST equipment manufacturers may find it increasingly difficult to sustain their production of UST equipment. Unnecessary constrictions on the free flow of capital for UST improvements to meet regulatory requirements could force companies to abandon their production of UST equipment or to close altogether, and it may have adverse impacts on the environment by inhibiting future investment in or development of new UST technological innovations.

The preamble to this rule is structured as follows: The following section briefly describes the UST program. This section is followed by a discussion of the rule, which includes a description of the various options lenders may exercise both pre- and post-foreclosure with respect to regulatory compliance for a secured UST or UST system. The rule concludes with regulatory text.

II. Description of the UST Regulatory Program

Based on the Agency's study of the banking community's lending practices and discussions with representatives of both lenders and borrowers, EPA believes that the lending community in general is not particularly familiar with the UST statutory scheme and regulatory program. Because USTs and UST systems are likely to be used as collateral in securing loans to borrowers, the Agency believes that it is appropriate and useful to briefly describe the UST program in the preamble of this rule. The following discussion is general in nature and is intended to provide a framework for lenders or others to better understand the scope and intent of the program; it is not intended to be a substitute for the regulations themselves.

Under the Hazardous and Solid Waste Amendments of 1984, Congress responded to the increasing threat to groundwater posed by leaking underground storage tanks by adding Subtitle I to the Resource Conservation and Recovery Act. Subtitle I required EPA to develop a comprehensive regulatory program for USTs storing petroleum or hazardous substances. Congress directed the Agency to publish regulations that would require owners and operators of new tanks and tanks already in the ground to prevent and detect leaks, cleanup leaks, and demonstrate that they are financially capable of cleaning up leaks and compensating third parties for resulting damages.

EPA's UST regulations, 40 CFR Parts 280 and 281, apply to any person who owns or operates an UST or UST system. The term "owner" is defined in the statute generally to mean any person who owns an UST used for the storage, use, or dispensing of substances regulated under Subtitle I of RCRA (which includes both petroleum and hazardous substances) (§ 9001(3), 42 USC 6991(3)). Owners are responsible for complying with the "technical requirements," "financial responsibility requirements," and "corrective action requirements" specified in the statute and regulations. These requirements are intended to ensure that USTs are managed and maintained safely, so that they will not leak or otherwise cause harm to human health and the environment. In addition, should a leak occur, the requirements provide that the owner is responsible for addressing the problem. These same requirements apply to any person who "operates" an UST system. The term "operator" is very broad and means "any person in control of, or having responsibility for, the daily operation of the underground storage tank" (§ 9001(4), 42 USC 6991(4)). As with owners, there may be more than one operator of a tank at a given time. Each owner and operator has obligations under the statute and regulations. In this respect, it is important to understand that a person may have obligations under Subtitle I either as an owner or as an operator, or both.

The following subsections describe briefly each of the major components of the UST regulatory program applicable to persons who own or operate USTs and UST systems.

A. UST Technical Standards

The technical standards of 40 CFR Part 280 referred to here include: Subpart B-UST systems: Design, Construction, Installation, and Notification (including performance standards for new UST systems, upgrading of existing UST systems, and notification requirements); Subpart C-General Operating Requirements (including spill and overfill control, corrosion protection, reporting and recordkeeping); Subpart D-Release Detection; § 280.50 (reporting of suspected releases) of Subpart E-Release Reporting, Investigation, and Confirmation; and Subpart G-Out of Service UST Systems (including temporary and permanent closure). These regulations impose obligations upon UST owners and operators, separate from the Subtitle I corrective action requirements discussed in Section II. B of this preamble.

1. Leak Prevention

Before EPA regulations were issued, most tanks were constructed of bare steel and were not equipped with release prevention or detection features. 40 CFR § 280.21 requires UST owners and operators to ensure that their tanks are protected against corrosion and equipped with devices that prevent spills and overfills no later than December 22, 1998. Tanks installed before December 22, 1988 must be replaced or upgraded by fitting them with corrosion protection and spill and overfill prevention devices to bring them up to new-tank standards. USTs installed after December 22, 1988 must be fiberglass-reinforced plastic, corrosion-protected steel, a composite of these materials, or determined by the implementing agency to be no less protective of human health and the environment, and must be designed, constructed,

and installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory. Piping installed after December 22, 1988 generally must be protected against corrosion in accordance with a national code of practice. All owners and operators must also ensure that releases due to spilling or overfilling do not occur during product transfer and that all steel systems with corrosion protection are maintained, inspected, and tested in accordance with § 280.31.

2. Leak Detection

In addition to meeting the leak prevention requirements, owners and operators of USTs must use a method listed in §§ 280.43 through 280.44 for detecting leaks from portions of both tanks and piping that routinely contain product. Deadlines for compliance with the leak detection requirements have been phased in based on the tank's age: The oldest tanks, which are most likely [*46694] to leak, had the earliest compliance deadlines. Phase-in of the leak detection requirements was completed in 1993, and all UST systems should now be in compliance with these requirements.

3. Release Reporting

UST owners and operators must, in accordance with § 280.50, report to the implementing agency within 24 hours, or another reasonable time period specified by the implementing agency, the discovery of any released regulated UST substances, or any suspected release. Unusual operating conditions or monitoring results indicating a release must also be reported to the implementing agency.

4. Closure

Owners or operators who would like to take tanks out of operation must either temporarily or permanently close them in accordance with 40 CFR part 280 subpart G-Out-of-Service UST Systems and Closure. When UST systems are temporarily closed, owners and operators must continue operation and maintenance of corrosion protection and, unless all USTs have been emptied, release detection. If temporarily closed for three months or more, the UST system's vent lines must be left open and functioning, and all other lines, pumps, manways, and ancillary equipment must be capped and secured. After 12 months, tanks that do not meet either the performance standards for new UST systems or the upgrading requirements (excluding spill and overfill device requirements) must be permanently closed, unless a site assessment is performed by the owner or operator and an extension is obtained from the implementing agency. To close a tank permanently, an owner or operator generally must: Notify the regulatory authority 30 days before closing (or another reasonable time period determined by the implementing agency); determine if the tank has leaked and, if so, take appropriate notification and corrective action; empty and clean the UST; and either remove the UST from the ground or leave it in the ground filled with an inert, solid material.

5. Notification, Reporting, and Recordkeeping

UST owners who bring an UST system into use after May 8, 1986 must notify state or local authorities of the existence of the UST and certify compliance with certain technical and other requirements, as specified in § 280.22. Owners and operators must also notify the implementing agency at least 30 days (or another reasonable time period determined by the implementing agency) prior to the permanent closure of an UST. In addition, owners and operators must keep records of testing results for the cathodic protection system, if one is used; leak detection performance and upkeep; repairs; and site assessment results at permanent closure (which must be kept for at least three years).

B. Corrective Action Requirements

Owners and operators of UST systems containing petroleum or hazardous substances must investigate, confirm, and respond to confirmed releases, as specified in §§ 280.51 through 280.67. These requirements include, where appropriate: Performing a release investigation when a release is suspected or to determine if the UST system is the source of an off-site impact (investigation and confirmation steps include conducting tests to determine if a leak exists

in the UST or UST system and conducting a site check if tests indicate that a leak does not exist but contamination is present); notifying the appropriate agencies of the release within a specified period of time; taking immediate action to prevent any further release (such as removing product from the UST system); containing and immediately cleaning up spills or overfills; monitoring and preventing the spread of contamination into the soil and/or groundwater; assembling detailed information about the site and the nature of the release; removing free product to the maximum extent practicable; investigating soil and groundwater contamination; and, in some cases, outlining and implementing a detailed corrective action plan for remediation.

C. Financial Responsibility Requirements

The financial responsibility regulations (40 CFR part 280 subpart H) require that UST owners or operators demonstrate the ability to pay the costs of corrective action and to compensate third parties for injuries or damages resulting from the release of petroleum from USTs. The regulations require all owners or operators of petroleum USTs to maintain an annual aggregate of financial assurance of $ 1 million or $ 2 million, depending on the number of USTs owned. Financial assurance options available to owners and operators include: Purchasing commercial environmental impairment liability insurance; demonstrating self-insurance; obtaining guarantees, surety bonds, or letters of credit; placing the required amount into a trust fund administered by a third party; or relying on coverage provided by a state assurance fund.

D. State Program Approval Regulations

Subtitle I of RCRA allows state UST programs approved by EPA to operate in lieu of the federal program. EPA's state program approval regulations under 40 CFR Part 281 set standards for state programs to meet.

E. Scope of the UST Program

This rule applies only to petroleum underground storage tanks that are subject to Subtitle I of RCRA. There are certain types or classes of tanks that are excluded from Subtitle I of RCRA. Therefore, the provisions of this rule do not apply to holders of security interests in excluded tanks. Among those tanks specifically excluded by statute are: Farm and residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; tanks used for storing heating oil for consumptive use on the premises where stored; tanks stored on or above the floor of underground areas (such as basements or tunnels); septic tanks; systems for collecting stormwater or wastewater; and flow-through process tanks (42 U.S.C. § 6991(1)).

III. The UST Security Interest Exemption and Intent of Today's Rule

A. Overview

Today's regulation addresses the requirements of Subtitle I that are applicable to a person who holds a security interest in a petroleum UST or UST system, or in a facility or property on which a petroleum UST or UST system is located, from the time that the person extends the credit up through and including foreclosure and re-sale. A holder of a security interest who satisfies the conditions in this rule will not be considered either an "owner" or an "operator" of an underground storage tank for purposes of compliance with Subtitle I regulatory requirements.

The security interest exemption under Subtitle I, § 9003(h)(9) of RCRA, 42 U.S.C. § 6991b(h)(9), on which this rule is based, provides:

As used in this subsection, the term "owner" does not include any person who, without participating in the management of an underground storage tank and otherwise not engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the owner's security interest in the tank.

While limited legislative history exists concerning the RCRA Subtitle I security interest exemption, EPA believes this provision is intended to provide protection from liability for a [*46695] person whose only connection with a tank is as the holder of a security interest; *i.e.*, a bank or other creditor who has made a loan to a borrower (commonly the tank's owner) and who has in return secured the loan by taking a security interest in the tank or in the property on which the tank is located. No guidance or other indication is available concerning the types of activities that Congress considered to be consistent with the Subtitle I security interest exemption, or about the types of activities that Congress considered to be impermissible participation in an UST or UST system's management.

The statutory exemption explicitly addresses liability for corrective action at petroleum UST-contaminated sites. Other portions of the statute and regulations applicable to an "owner" of a tank include 40 CFR part 280 subparts B, C, D, E (§ 280.50 only), and G (hereafter referred to as the "UST technical standards" for purposes of this rule), and Subpart H-Financial Responsibility. The statute is silent with respect to a holder's liability for these other requirements solely as a consequence of having ownership rights in a tank primarily to protect a security interest. The Agency does not believe that these limited ownership rights rise to the level of full "ownership" sufficient to make the holder an "owner" of the tank, as that term is used in § 9001(3) of RCRA Subtitle I. Therefore, EPA is providing, under its broad rulemaking authority in § 9003, that a holder who meets the criteria specified in this rule (i.e., whose only connection with the tank is as the *bona fide* holder of a security interest in a petroleum UST or UST system or in a facility or property on which a petroleum UST or UST system is located) is not subject to the UST technical standards, corrective action, and financial responsibility requirements otherwise applicable to a tank owner. EPA believes that this is both appropriate under the Agency's rulemaking authority and consistent with Congressional intent in providing the § 9003(h)(9) exemption for those persons who provide only financing to owners of a tank. Accordingly, a qualifying holder will not be required to comply with the full panoply of EPA regulations implementing Subtitle I that apply to tank owners prior to or following foreclosure, provided that the requirements of today's rule are satisfied.

With respect to a holder's potential to be an "operator" of a tank prior to foreclosure, consistent with the provisions of this rule, the holder typically will not be involved in the day-to-day operations of the tank, and will therefore not incur liability as an "operator." n2 By foreclosing, however, the holder takes affirmative action with respect to the tank and displaces the borrower; therefore, by necessity, the holder has taken "control of * * * [and] responsibility for * * *" the tank, and therefore could be considered a tank operator under the definition at 42 USC 6991(4). However, under today's rule, a foreclosing holder can avoid regulation as an UST "operator" in certain circumstances. In general, a holder will not be considered an UST "operator" if petroleum is not added to, stored in, or dispensed from the UST. In order to satisfy this condition, this rule allows a holder to empty the UST within a certain period of time after foreclosure, and undertake specified minimally burdensome and environmentally protective actions to secure and protect the UST or UST system. On the other hand, a holder who operates a tank by, for example, storing or dispensing petroleum following foreclosure will be subject to the full range of requirements applicable to any person operating a tank (including corrective action requirements).

n2 Of course, a lender which has control of or responsibility for the daily operation of a tank would be an "operator" under § 9001(4), and therefore subject to all requirements applicable to an operator of a tank, including corrective action. Similarly, such acts may also constitute "participation in the management" of the tank, which would void the § 9003(h)(9) exemption and obligate the lender to comply with these same technical, financial, and corrective action requirements as an owner.

In developing today's rule, EPA examined the potential obligations under Subtitle I of government entities that act as conservators or receivers of assets acquired from failed lending and depository institutions, such as the Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC). Where a government entity or its designee is acting as a conservator or receiver, EPA interprets the security interest exemption RCRA Subtitle I section 9003(h)(9) to preclude the imposition of the insolvent estate's liabilities against the government entity acting as the conservator or receiver, and considers the liabilities of the institution being administered to be limited to the institution's assets. The situation of a conservator or receiver of a failed or insolvent lending institution is analogous to that of a trustee (particularly a trustee in bankruptcy) that is administering an insolvent's estate and, in accordance with those

principles, the insolvent's liabilities generally are to be satisfied from the estate being administered and not from the assets of the conservator or receiver. Therefore, satisfaction of an estate's debts or liabilities would not reach the general assets of the FDIC, the RTC, those of any other government entity acting in a similar capacity, or those of a private person acting on behalf of the conservator or receiver. (The broader issue of trustee and fiduciary liability is discussed in section IV.C. of this preamble.)

B. Legal Authority

EPA is promulgating today's rule to close a gap in the Subtitle I security interest exemption that must be addressed in order to provide holders with certainty regarding their responsibility for UST regulatory compliance. While the statutory exemption explicitly applies to holders who become owners of underground storage tanks, the exemption does not address holders in the capacity of an UST operator. The Agency believes that without promulgating a rule under EPA's broad grant of rulemaking authority applying the protection found in the statutory security interest exemption to holders as operators as well as owners, the statutory exemption may be rendered virtually meaningless, since an owner of an UST is also typically an UST operator. EPA does not believe that Congress, in creating section 9003(h)(9), intended for an otherwise exempt holder of a security interest to nonetheless fall subject to UST regulatory obligations as an operator. As such, EPA's exercise of its rulemaking authority in this rule is appropriate and, perhaps, needed to fully effectuate the purpose of the statute.

In the proposed rule, EPA cited the legal authority that provides the basis for development of the UST lender liability rule-section 9003(b), 42 U.S.C. 6991b(b) of RCRA Subtitle I, and briefly explained the difference between the statutory authority supplied under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the vacated Superfund lender liability rule and the authority supplied under RCRA Subtitle I for an UST lender liability rule. While several commenters stated their belief that EPA has sufficient authority under RCRA to promulgate a regulation regarding UST lender liability, some commenters also expressed concern that the rule would be challenged in light of the outcome of litigation on the CERCLA lender liability rule. n3

n3 On Feb. 4, 1994, the U.S. Court of Appeals for the D.C. Circuit vacated EPA's 1992 rule on lender liability under CERCLA in Kelley, et al. v. EPA, No. 93-1312. The CERCLA rule interpreted a statutory exemption under CERCLA that is similar to that under RCRA Subtitle I. The Court held that "EPA lack[ed] statutory authority to restrict by regulation private rights of action arising under the statute * * *" Kelley, slip op. at 3. Whereas CERCLA contains a provision regarding private rights of action, there is no explicit provision for private rights of action contained in RCRA Subtitle I. Furthermore, § 9003 of Subtitle I expressly confers EPA a broad rulemaking authority; to the extent that the grants of rulemaking authority were not sufficiently explicit under CERCLA, such is not the case under RCRA Subtitle I. [*46696]

EPA believes that the authority granted in section 9003 of Subtitle I clearly provides the Agency with broad rulemaking authority, as well as explicit rulemaking authority to, in its discretion, exempt certain classes of owners and operators (i.e., holders of security interests as described in this rule) from the UST technical standards, corrective action requirements, and financial responsibility requirements. Section 9003 expressly directs the Agency to "promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment." Section 9003(b) permits the Agency, in promulgating regulations under Subtitle I, to make distinctions in its UST regulations between types or classes of tanks, based upon, *inter alia,* "the technical capability of the owners and operators." Because security interest holders are typically not as a general matter engaged in the operation and maintenance of USTs (and thus do not possess the technical capacity of most UST owners and operators), EPA does not believe that requiring them to comply with highly detailed technical requirements is appropriate where requiring them to do so is not necessary for protection of human health and the environment. Furthermore, the Agency believes an exemption from these regulatory requirements is appropriate in the context of this rule, where an exemption will serve, albeit indirectly, to advance the goals of Subtitle I by making credit more available and thus aiding in the implementation of tank upgrading and replacement requirements.

However, this authority is not open-ended, as section 9003(a) requires EPA to promulgate regulations that are protective of human health and the environment. Without compromising the level of protectiveness established by the UST program, EPA previously relied on its section 9003(b) authority when it excluded a group of owners and operators from RCRA Subtitle I requirements in the final Financial Responsibility Rule (53 FR 43322, Oct. 26, 1988). (In relevant part, the preamble to the final Financial Responsibility Rule states: "The Agency does not interpret the Congressional intent of Subtitle I to preclude exempting any class of USTs from otherwise applicable requirements when the Agency has determined that such requirements are not necessary to protect human health or the environment.") That rule exempted states and the federal government from the UST financial responsibility requirements since those entities were, as a class, able to satisfy the purpose of the financial responsibility requirements in the absence of regulation.

Similarly, for purposes of this rule, EPA believes that it is reasonable, in light of the purposes behind this rule, to exempt a holder from RCRA Subtitle I technical standards, corrective action requirements, and financial responsibility requirements as an operator if its USTs are empty and secure (as explained later in today's rule) or if the holder chooses to also engage in environmentally beneficial activities (as discussed later in this preamble). Because of the eligibility conditions a holder must meet before enjoying this regulatory exemption, EPA's UST regulations will satisfy the statutory requirement that they be protective of human health and the environment.

C. Real Property Used as Collateral

A number of commenters pointed out that the proposed rule conveys the impression that under common commercial practice a security interest holder typically holds an UST or UST system as collateral for a loan obligation. These commenters went on to state that such an impression is incorrect. They maintained that in a typical lending relationship, the lender holds a security interest not in the UST or UST system, but rather in the real property on which the UST or UST system is located.

EPA recognizes that borrowers generally pledge real property as collateral rather than tanks, which are considered fixtures of real property under many state laws. While the Agency failed to refer to real property in its definition of the term, "holder," it specifically defined "security interest" as meaning "an interest in a petroleum UST or UST system or in the facility or property on which the UST or UST system is located, created or established for the purpose of securing a loan or other obligation." EPA acknowledges that the phrase, "UST or UST system or facility or property on which the UST or UST system is located," was not used consistently throughout the proposed rule. This was due in part to the way in which Subtitle I's requirements are structured-UST compliance responsibility rests with the owner or operator of the UST or UST system, not the property on which the UST or UST system is located. Therefore, when describing a holder's liability as an owner or operator under Subtitle I requirements, EPA is obliged to address that liability in terms of how it relates to the ownership or operation of the UST or UST system. Nevertheless, in order to maintain consistency with commercial practice and to clarify that the exemption applies to a holder's collateral in the real estate containing an UST, as well as to the UST itself, the Agency has applied the use of the term, "UST or UST system or facility or property on which the UST or UST system is located," throughout today's final rule, whenever appropriate.

D. Abandoned Tanks

A few commenters expressed concern about the effect that the rule would have upon the number of contaminated sites for which there might be no identifiable or financially capable liable party, which might increase the number of abandoned tanks that would have to be cleaned up with public funding. There are a number of reasons why EPA does not expect the rule to increase the number of abandoned tanks.

First, this regulation is intended to provide clarity and meaning to the existing federal statutory security interest exemption. The rule does not decrease the universe of regulated tanks from those currently regulated under Subtitle I. Further, the rule does not affect the legal obligations to comply with applicable Subtitle I requirements of a previous owner or operator who abandons a tank. Such previous UST owners and operators can be held liable for regulatory

compliance or cost recovery under the Leaking Underground Storage Tank Trust Fund. Financial condition does not affect the liability of a tank owner or operator under Subtitle I.

Second, the rule is expected to help UST owners and operators acquire capital to keep their businesses healthy and in compliance with environmental requirements, and in the process, reduce the number of abandoned tanks and potential petroleum releases. Furthermore, the Agency believes that by expanding capital availability, this rule will encourage early compliance with the upcoming 1998 Subtitle I requirement regarding tank upgrading or [*46697] replacement. UST owners who acquire capital to upgrade or replace old, corroded tanks earlier than 1998 greatly contribute to preventing further petroleum contamination.

While contemplating the effect this rule might have upon the number of abandoned tanks, the Agency also recognized that many holders currently abandon UST properties they hold as collateral rather than foreclosing on them and risking potential liability for cleanup costs. EPA believes that this rule will actually improve protection of human health and the environment by providing an incentive to holders who are interested in taking advantage of this regulatory exemption to empty any tanks they acquire through foreclosure, thus preventing future releases. As a result of the rule's increasing the number of holders who take advantage of the security interest exemption and subsequently extend more UST-related loans, EPA expects there to be fewer abandoned or so-called orphan tanks and fewer releases that might otherwise occur due to the lack of capital available for tank upgrading and replacement.

E. Liability of a Holder as an Owner of an Underground Storage Tank or Underground Storage Tank System

The following sections describe the key terms used in this rule. For the most part, these are also terms used in the § 9003(h)(9) security interest exemption. This section specifies the activities that are not "participating in the management" of a tank and which a holder may under today's rule, engage in consistent with Subtitle I regulatory requirements.

1. Petroleum Production, Refining, and Marketing

"Production of petroleum" includes, but is not limited to, activities involved in the production of crude oil or other forms of petroleum, as well as the production of petroleum products from purchased materials, either domestically or abroad. "Refining" includes the processes of cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products. "Marketing" includes the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes. A holder who stores petroleum products in USTs for on-site consumption only, such as to provide heat to an office building or to refuel its own vehicles, is not considered to be engaged in petroleum production, refining, or marketing for the purposes of the UST regulatory program.

2. Indicia of Ownership

For purposes of this rule, "indicia of ownership" means ownership or evidence of an ownership interest in a petroleum UST or UST system, or in a facility or property on which a petroleum UST or UST system is located. This definition is not intended to limit or qualify type, quality, or quantity of ownership indicia that may be held by a person for the purpose of the regulatory exemption. The nature of the ownership interest may vary according to the type of secured transaction and the nature of the holder's relationship (such as that of a guarantor or surety). Accordingly, indicia of ownership may be evidence of any ownership interest or right to an UST or UST system, such as a security interest, an interest in a security interest, or any other interest in an UST or UST system. For purposes of this rule, examples of such indicia include, but are not limited to, a mortgage, deed of trust, or legal or equitable title obtained pursuant to foreclosure or its equivalents, a surety bond, guarantee of an obligation, or an assignment, lien, pledge, or other right to or form of encumbrance against a petroleum UST or UST system, or a facility or property on which a petroleum UST or UST system is located. Accordingly, it is not necessary for a person to hold actual title or a security interest in order to maintain some indicia or evidence of ownership in an UST or UST system.

3. Primarily To Protect a Security Interest

The term, "primarily to protect a security interest" as used in this regulation, means a holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation. EPA intends this phrase to require that the ownership interest be maintained primarily for the purpose of, or primarily in connection with, securing payment or performance of a loan or other obligation (a security interest), and not an interest in the UST or UST system or facility or property on which the UST or UST system is located held for some other reason.

A security interest may arise pursuant to a variety of statutory or common law financing transactions. While a security interest is ordinarily created by mutual consent, such as a secured transaction within the scope of Article 9 of the Uniform Commercial Code, there are other means by which a security interest may be created, some of which may or may not be the result of a consensual arrangement between the parties to the transaction. In general, a transaction that gives rise to a security interest within the ambit of this rule is one that provides the holder with recourse against the UST or UST system or facility or property on which the UST or UST system is located; the purpose of the interest is to secure the repayment of money, the performance of a duty, or of some other obligation. See generally J. White & R. Summers, Handbook on the Uniform Commercial Code § 22 (2d Ed. 1980); Restatement of Security (1941).

As a matter of general law, security interests may arise from transactions in which an interest in an UST or UST system is created or established for the purpose of securing a loan or other obligation, and includes mortgages, deeds of trust, liens, and title held pursuant to lease financing transactions. Security interests may also arise from transactions such as sale-and-leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements or accounts receivable financing agreements, consignments, among others, provided that the transaction creates or establishes an interest in an UST or UST system for the purpose of securing a loan or other obligation.

Some commenters were confused by and requested clarification of the term "lease financing transaction in which the lessor does not select initially the leased property," as used is the rule. A "lease financing transaction" is a common financing transaction for equipment and other types of personal property, and is treated under this rule as a security interest. These are leases where the form of the transaction provides for the lessor to acquire title to the property for and at the discretion of the lessee. The lessor then recovers its loan (i.e., the purchase price of the property) through rental payments from the lessee and, in some cases, from the sale of the property to the lessee or a third party at the end of the lease. Thus, the lessee is the borrower and the lessor is the holder of a security interest in the property.

At the beginning of the lease financing transactions covered by this rule, the lessor does not initially select the leased property. Instead, this is done by the lessee or a third party. Further, during the initial lease or any re-lease, the lessor does not control the daily operation and maintenance of the property. The primary reason the lessor holds indicia of ownership in the property is to protect its security interest in the event that the debtor/lessee fails to pay off its obligation to [*46698] the lessor. If a debtor/lessee defaults, a lessor may acquire the property through a variety of mechanisms, and is still considered to hold indicia of ownership under this rule provided that it complies with the other provisions of this rule.

In contrast to the preceding discussions, "indicia of ownership" held "primarily to protect [a] security interest" do not include evidence of interests in the nature of an investment in the UST or UST system or in the facility or property on which the UST or UST system is located, or an ownership interest held primarily for any reason other than as protection for a security interest. The person holding ownership indicia to protect a security interest may have additional, secondary reasons for maintaining the indicia in addition to protecting a security interest; maintaining indicia for reasons in addition to protecting a security interest may be consistent with the exemption and this rule. However, any such additional reasons must be secondary to protecting a security interest in the secured UST or UST system or in the facility or property on which the UST system is located. EPA recognizes that lending institutions have revenue interests in the loan transactions that create security interests; such revenue interests are not considered to be investment interests, but are considered secured transactions falling within the security interest regulatory exemption.

4. "Holder" of Ownership Indicia

A "holder" as used in this regulation is a person who maintains ownership indicia primarily to protect a security interest, however acquired or held. The term "holder" includes the initial holder (such as the loan originator) and any subsequent holder, such as a successor-in-interest, subsequent purchaser on the secondary market, loan guarantor, surety, or other person who maintains indicia of ownership primarily to protect a security interest. The term also includes any person acting on behalf of or for the benefit of the holder, such as a court-appointed receiver or a holder's agent, employee, or representative.

Finally, it should be noted that lending institutions, which typically hold a large number of security interests, may also act in some trustee, fiduciary, or other capacity with respect to an UST or UST system. However, this rule does not address circumstances in which a lending institution or any person acts as a trustee, or in a non-lending capacity, or has any interest in an UST or UST system other than as provided in this rule. Because this regulation, as well as the exemption in § 9003(h)(9), addresses only persons who maintain a "security interest," any discussion of persons with other interests or involvement in an UST or UST system is beyond the scope of this rule. Of course, a trustee or other fiduciary, or any other person who holds indicia of ownership in the UST or UST system primarily to protect a security interest, may fall within this security interest regulatory exemption.

5. Participating in Management

As used in this rule, "participation in management" means actual involvement in the management or control of decisionmaking related to the operational aspects or day-to-day operations of an UST or UST system by the holder. Participation in management does not include the mere capacity or unexercised right or ability to influence the operational aspects or day-to-day operations of an UST or UST system or facility or property on which an UST or UST system is located. For purposes of this rule, actual involvement in the operational aspects or day-to-day operation of the UST or UST system means use of the UST to contain petroleum, and includes the storage, filling, or dispensing of petroleum contained in an UST or UST system. For purposes of this rule, a holder performing the functions of a plant manager, operations manager, chief operating officer, chief executive officer, and the like, of the facility or business at which the UST is located is considered to be exercising management control or decisionmaking authority over the operational aspects of the UST or UST system and therefore, participating in management, unless the responsibilities for the position specifically exclude all UST operational responsibilities. Control over the operational aspects of management should not be confused, however, with those activities which constitute administrative or financial management, or involvement in environmental compliance activities or activities taken to protect human health and the environment. Involvement in administrative, financial management, or environmental compliance activities does not, by itself, constitute participation in management under this rule.

The proposed rule included a two-pronged general test of management participation that attempted to distinguish between the scope of general activities acceptable for a holder to undertake, and those activities that could be carved out purely as operational activities rather than other activities related to UST or UST system responsibilities. However, the Agency received a number of comments on the proposed rule indicating that the general test merely added confusion in determining whether or not a holder was engaging in management participation. Consequently, the general test has been omitted in this final rule. Instead, the Agency has concluded that management participation is best defined as actual involvement in the management or control of decisionmaking related to the operational aspects or day-to-day operations of the UST or UST system, and not the financial, administrative or environmental compliance aspects of the UST or UST system or facility or property on which the UST or UST system is located.

The following sections discuss and describe the specific activities of a holder that the rule defines as not being instances of participation in management by a person holding indicia of ownership primarily to protect a security interest in the UST or UST system or facility or property on which an UST or UST system is located. Therefore, conduct of these activities will not, by itself, void the exemption for holders of security interests provided under this rule.

It bears repeating, however, that the activities identified in this rule do not specify the only activities that may be undertaken by a holder without losing the protection of this security interest regulatory exemption, and one should not infer that activities not specifically mentioned in this rule are automatically considered evidence of participation in management-those must be addressed on a case-by-case basis, generally determined by whether or not the holder is involved in the management or control of decisionmaking related to the operational aspects or day-to-day operations of an UST or UST system.

a. Actions that are not participation in management. Participation in the following activities will not exclusively, in themselves, exceed the bounds of this regulatory exemption: Policing the loan; undertaking financial work out with a borrower where the obligation is in default or in threat of default; undertaking foreclosing and winding up operations (as described later in this preamble); or preparing for sale or liquidation of the UST or UST system or facility or property on which the UST or UST system is located. In addition, the holder is not considered to be participating in the management of the UST or UST system or facility or property on which the UST or UST system is located, by monitoring the [*46699] borrower's business; by requiring or conducting environmental compliance activities related to the UST technical standards or other federal, state or local environmental laws and regulations; by requiring or conducting on-site investigations, including site assessments, inspections, and audits, of the environmental condition of the UST or UST system or facility or property on which the UST or UST system is located or of the borrower's financial condition; by requiring or conducting UST or UST system corrective action in compliance with 40 CFR part 280 subpart F or applicable state requirements in those states which have been delegated authority by EPA to administer the UST program; by monitoring other aspects of the UST or UST system considered relevant or necessary by the holder; by requiring certification of financial information or compliance with applicable duties, laws, or regulations, or by requiring other similar actions. Such oversight and obligations of compliance imposed by the holder are not considered part of the management of an UST or UST system or facility or property on which the UST or UST system is located. Although such oversight and obligations may inform and perhaps strongly influence the borrower's management of an UST or UST system, the holder is not considered to be participating in management where the borrower continues to be in control of the day-to-day operations of the UST or UST system.

The following sections describe in more detail two areas of special interest to those who commented on the proposed rule regarding actions in which holders may engage without jeopardizing their security interest exemption.

(1) Administrative and Financial Management. Administrative and financial management activities may be engaged in by a holder in the course of managing a loan portfolio and do not exceed the boundaries of the security interest exemption. Such activities may include providing financial or other assistance, environmental investigations or monitoring of the borrower's business and collateral, engaging in "loan work out" activities, foreclosing on a secured UST or UST system or facility or property on which an UST or UST system is located, winding down operations following foreclosure, or divesting itself of the foreclosed-on property containing an UST or UST system.

(2) Actions Taken to Protect Human Health and the Environment. In the proposed rule, EPA included a separate discussion of voluntary environmental activities undertaken by a holder to protect human health and the environment. A number of commenters stated that this discussion conflicted in part with the discussion entitled "Participating in Management," thereby creating uncertainty regarding a holder's ability to conduct or to require a borrower to conduct site investigation and remediation activities, as well as leak prevention and leak detection activities. The "Participating in Management" section of the proposal's preamble contained information that simultaneously stated that environmental compliance activities would be considered evidence of participation in UST or UST system management, while describing several environmental compliance activities for which a lender could engage in without being considered to be participating in UST or UST system management. The Agency also stated in the proposal's preamble that lender actions which protect human health and the environment are appropriate to include within the scope of protected UST or UST system activities because of the special position and role played by holders in the Subtitle I program, and recognized by Congress in the UST security interest statutory exemption. Several commenters stated the importance of allowing security interest holders to undertake UST remediation to ensure that they can sell UST properties they acquire through foreclosure without jeopardizing protection from Subtitle I liability. Commenters stated that without such

protection, many holders will remain reluctant to extend loans to UST owners and operators, undermining the intent of the statutory exemption. Several of these commenters asserted the advantage of allowing holders to take the lead in remediating contaminated sites, rather than waiting on state agencies with limited resources to conduct such cleanups. By directly undertaking such voluntary corrective actions, holders can more quickly eliminate threats to public safety, health, and the environment.

Thus, in order to clarify EPA's original intent to allow holders to voluntarily conduct site remediations as well as other environmentally beneficial activities on properties on which they hold a security interest, the Agency asserts that both environmental compliance activities and activities that are undertaken voluntarily to protect human health and the environment will not be considered evidence of participation in the management of an UST or UST system or facility or property on which an UST or UST system is located. A holder who undertakes these actions must do so in compliance with the applicable requirements in 40 CFR part 280 or applicable state requirements in those states that have been delegated authority by EPA to administer the UST program pursuant to 42 USC § 6991c and 40 CFR part 281.

The following list provides examples of those activities that a holder can engage in without exceeding the bounds of the UST security interest exemption-these are examples only and do not represent all allowable activities: release response and corrective action for UST systems, environmental site investigations, tank upgrading and replacement, leak detection, and maintenance of corrosion protection. These activities are not required of a holder as a condition for obtaining the security interest exemption as an UST "owner"; holders are allowed to participate in these activities without losing the protection of the exemption. Other activities that are not considered participation in management may be required of a holder as a condition for obtaining the security interest exemption as an UST "operator." These activities are discussed later in this preamble, and include: tank emptying, capping and securing lines, permanent or temporary closure of an UST or UST system, and release reporting.

b. Actions taken throughout the loan transaction process that are not participation in management. In the proposed rule, EPA described the major components of the loan transaction process, including elements of that process that occur both prior to and after foreclosure. Most of that discussion is included in this final rule as well, in order to provide clarity and guidance to those UST owners and operators and security interest holders interested in this rule.

(1) Actions at the inception of the loan or other transaction giving rise to a security interest. Actions undertaken by a holder prior to the inception of a transaction in which indicia of ownership are held primarily to protect a security interest are not considered evidence of participation in the management of the UST or UST system. Thus, consultation and negotiation concerning the structure and terms of the loan or other obligation, the payment of interest, the payment period, and specific or general financial or other advice, suggestions, counseling, guidance, or other actions at or prior to the time that indicia of ownership are [*46700] first held are not, for purposes of this rule, considered evidence of participation in the management of the UST or UST system or facility or property on which the UST or UST system is located. Activities that take place prior to holding indicia of ownership are not relevant for determining whether the holder has participated in the management of the UST or UST system after the time that the holder acquires indicia of ownership.

In addition to such pre-loan involvement, a holder may determine (whether for risk management or any other business purpose) to undertake or require an environmental investigation (which could include a site assessment, inspection, and/or audit) of an UST or UST system securing the loan or other obligation. Such environmental investigation may be undertaken by the holder, for example, or the holder may require one to be conducted by another party (such as the borrower) as a condition of the loan or other transaction. Neither RCRA Subtitle I nor this rule require that such an environmental investigation be undertaken to qualify for the security interest exemption, and the obligations of a holder seeking to avail itself of the exemption cannot be based on or affected by the holder's not conducting or not requiring an environmental investigation in connection with the security interest. Similarly, a holder is not engaged in management participation as a result of undertaking or requiring an environmental investigation, and nothing in this rule should be understood to discourage a holder from undertaking or requiring such an environmental investigation in circumstances deemed appropriate by the holder. Because lender-conducted or required investigations

of a borrower's business or collateral are information-gathering in nature, such activities cannot be considered to be management participation by a holder.

In the event that a pre-loan environmental investigation of an UST or UST system reveals contamination, the holder may undertake any one of a variety of responses that it deems appropriate: For example, the holder may refuse to extend credit or to follow through with the transaction or instead maintain indicia of ownership in other, non-contaminated property as protection for the security interest. Alternatively, a holder may determine that the risk of default is sufficiently slight (or that the extent of contamination is minimal and does not significantly affect the value of the UST or UST system as collateral) to proceed to extend credit and maintain indicia of ownership in the UST or UST system. Additionally, the holder may require the borrower to report and clean up the contamination as a condition for extending the loan. Such activities are not considered participation in the management of the UST or UST system or facility or property on which the UST or UST system is located, and a holder that knowingly takes a security interest in contaminated collateral is not subject to compliance with the RCRA Subtitle I corrective action regulatory program on that basis.

(2) Policing the security interest or loan. A holder may undertake actions that are consistent with holding ownership indicia primarily to protect a security interest which include, but are not limited to, a requirement that the borrower clean up a release from the UST or UST system which may have occurred prior to or during the life of the loan or security interest (as described in the last section); a requirement of assurance of the borrower's compliance with applicable federal, state, and local environmental or other laws and regulations during the life of the loan or security interest; securing authority or permission for the holder to periodically or regularly monitor or inspect the UST or UST system or facility or property on which the UST or UST system is located, or the borrower's business or financial condition, or both; or to comply with legal requirements to which the holder is subject; or other requirements or conditions by which the holder is able to police adequately the loan or security interest, provided that the exercise by the holder of such other loan policing activities are not considered evidence of control over the operational aspects of UST or UST system or facility or property on which the UST or UST system is located.

The authority for the holder to take such actions may be contained in contractual (e.g., loan) documents or other relevant documents specifying requirements for financial, environmental, and other warranties, covenants, and representations or promises from the borrower. While the regulatory exemption in this rule requires that the actions undertaken by a holder in overseeing or managing the loan or other obligation be consistent with those of a person whose indicia of ownership in an UST or UST system (or facility or property on which an UST or UST system is located) is held primarily to protect a security interest, a holder is not expected to be an insurer or guarantor of environmental safety or quality at a secured UST or UST system. The inclusion of environmental warranties and covenants is not considered to be evidence of a holder's acting as an insurer or guarantor, and a finding of "management participation" cannot be premised on the existence of such terms or upon the holder's actions that ensure that the UST or UST system is managed in an environmentally sound manner. Since these actions are consistent with holding indicia of ownership primarily to protect a security interest, they are not considered to be participation in management in this rule.

(3) Loan work out. The holder may determine that actions need to be taken with respect to the UST or UST system to safeguard the security interest from loss. These actions may be necessary when, for example, a loan is in default or threat of default, and are commonly referred to as "loan work out" activities. "Loan work out" is largely an undefined term but is generally understood in the financial community to mean those activities undertaken to prevent, mitigate, or cure a default by the obligor or to preserve or prevent the diminution of the value of the security. Loan work out activities are recognized by EPA as a common lender undertaking and, as such, these actions will not take a holder outside of the scope of the security interest exemption provided that such actions do not include decisionmaking control over the day-to-day operation of the UST or UST system or facility or property on which the UST or UST system is located.

When the holder undertakes loan work out activities, provides financial or other advice, or similar support to a financially distressed borrower, the holder will remain within the scope of this security interest regulatory exemption

only so long as the holder does not participate in management as defined herein under the section entitled "Participating in Management." Loan work out actions that are not evidence of "participation in management" include, but are not limited to: Restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance with regard to the security interest; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, [*46701] representations, or promises from the borrower.

(4) Foreclosure. In order to secure performance of an obligation, a holder often must take possession of an UST or UST system or facility or property on which an UST or UST system is located, as a result of a borrower's business failure and the subsequent foreclosure of the real property used to secure that obligation. The foreclosure process often results in the holder's taking record title or deed to the UST or UST system or facility or property on which an UST or UST system is located. Financial institutions and others who hold security interest exemptions are thereby justifiably concerned about the risks inherent in acquiring liability for compliance with the RCRA Subtitle I requirements for underground storage tanks.

EPA received several comments regarding the foreclosure process and the use of the term "foreclosure or its equivalents" in the proposed rule to trigger the date upon which several conditional measures were proposed to begin. Several commenters explained the linear fashion in which the foreclosure process generally works, indicating that no specific date could be tied to the term "foreclosure" by itself. EPA recognizes that since this rule places several time-related conditions upon a holder to enable it to avoid liability as an UST "operator" under the security interest exemption, it is incumbent upon the Agency to select a precise definition of the term "foreclosure." On the other hand, as commenters suggested, there is no one best consistently used and practical step in the process that can be used as a date to define the end of the foreclosure process. EPA has taken all of these facts into consideration and determined that for purposes of this rule, "foreclosure" means that a legal, marketable or equitable title or deed has been issued, approved and recorded, and that the holder has obtained access to the UST, UST system, UST facility, and property on which the UST or UST system is located, provided that the holder acted diligently to acquire marketable title or deed and to gain access to the UST, UST system, facility and property on which the UST or UST system is located.

EPA acknowledges that the definition of "foreclosure" used in this rule describes only part of the process that is generally associated with the foreclosure process. In response to many comments, however, the concept of real property "access" has also been included in the definition. The definition used in this rule was selected to provide a point of reference for indicating the completion of the foreclosure process and point at which a holder could physically access any USTs or UST systems located on the property acquired through the foreclosure process.

Other components of the foreclosure process not referenced specifically in this rule's definition of foreclosure include: foreclosure judgment, foreclosure sale, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to possession or title, or other agreement in settlement of the loan obligation, or any other formal or informal manner by which the holder acquires possession of the borrower's collateral for subsequent disposition in partial or full satisfaction of the underlying obligation. These actions associated with the foreclosure process are considered to fall within the scope of this regulatory exemption as necessary incidents to holding ownership indicia primarily to protect a security interest, so long as the holder's acquisition pursuant to foreclosure is reasonably necessary to ensure satisfaction or performance of the obligation, is temporary in nature, and occurs while the holder is actively seeking to sell or otherwise divest the foreclosed-on UST or UST system of facility or property on which the UST or UST system is located.

In general, under this rule, a foreclosing holder must, in order to maintain consistency with the security interest exemption, seek to sell or otherwise divest itself of foreclosed-on property in a reasonably expeditious manner using whatever commercially reasonable means are available or appropriate, taking all facts and circumstances into account. A holder cannot, under the terms of this rule, reject or refuse offers for the property that represent fair consideration for

the asset and remain within the regulatory exemption. "Fair consideration," for purposes of this rule, is equivalent to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or in the case of a lease financing transaction, possession of an UST or UST system or facility or property on which an UST or UST system is located) pursuant to foreclosure, plus any unpaid interest, rent, or penalties (whether arising before or after foreclosure). "Fair consideration" also includes all reasonable and necessary costs, debts, fees or other charges incurred by the holder incident to work out, foreclosure, retention, preserving, protecting, and preparing the UST or UST system or facility or property on which the UST or UST system is located, prior to sale, re-lease pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or other disposition, plus environmental compliance costs (such as tank emptying, upgrading, replacement, and removal, as well as site assessment and corrective action costs); less any amounts received by the holder in connection with any partial disposition of the property and any amounts paid by the borrower subsequent to the acquisition of full title (or possessions in the case of an UST or UST system subject to a lease financing transaction) pursuant to foreclosure. A holder that outbids or refuses offers from parties offering fair consideration for the property establishes that the property is no longer being held primarily to protect a security interest. The terms of the bid are relevant for this purpose, and a holder is not required to accept offers that would require it to breach duties owed to other holders, the borrower, or other persons with interests in the property that are owed a legal duty. In addition, the term "fair consideration" refers to an all cash offer, which is intended to ensure that this rule would not require a holder to accept a bid that contains unacceptable conditions, such as requirements for indemnification agreements, non-cash offers, "bundled" offers, etc. This provision should not be read to require that a holder may accept only cash offers, however; a holder is always free to accept any offer satisfactory to the holder. The exact requirement that would be imposed by this regulation is that a holder may not reject a cash offer of fair consideration for the foreclosed-on property. If it does, or if it outbids others offering fair consideration, then the holder would, under this rule, be considered to be an owner of the UST or UST system or facility or property on which the UST or UST system is located in the same manner as any other purchaser.

This rule's provisions defining "fair consideration" and specifying when the foreclosing holder may reject or outbid offers for the property were formulated to reflect the amount that the holder may bid at the foreclosure sale, or not reject during the foreclosure sale or thereafter, in order to recover on its loan or other obligation. In addition, there may be multiple security interests in a borrower's property held by secured creditors, which the definition of "fair consideration" must account for. Therefore, for a senior creditor, the term [*46702] "fair consideration" means a cash amount that represents a value equal to or greater than the outstanding obligation owed to the holder (including the fees, penalties, and other charges incurred by the holder in connection with the property). "Fair consideration" further indicates that the amount that will recover the holder's "security interest" in the property may vary depending on the seniority of the loan or other obligation that is being foreclosed upon. Specifically, a junior creditor may be required to outbid senior creditors in order to recover the value of its loan or other obligation. The definition of fair consideration therefore distinguishes between what junior or senior creditors may bid or not reject for purposes of maintaining the exemption. In addition, in order to avoid liability under law (for example, to the borrower), the foreclosing holder may be required to seek an amount at the foreclosure sale that is greater than the outstanding obligation owed to the foreclosing holder, or to sell the property in a different manner; therefore, this rule does not require a holder to accept an offer of "fair consideration" if to do so would subject the holder to liability under federal or state law.

In this way the rule's provisions with respect to the sale or disposition of property will not conflict with the manner in which such sales are required to be conducted under general principles of law applicable to the holder and the disposition of the property including the UST or UST system. For purposes of this rule, the definition of "fair consideration" is an objective test to determine whether the foreclosing holder has an investment or other interest in the property that is not within the exemption, or whether the holder's post-foreclosure activities indicate that it continues to maintain its ownership indicia in the property primarily to protect a security interest, and is therefore within the protective ambit of this rule.

While a holder may use whatever means are reasonable and appropriate for marketing foreclosed-on property to

establish that it is seeking to divest itself of property in an expeditious manner, EPA has established the following "bright line" test that a holder may choose to use to definitely establish that it continues to hold indicia of ownership primarily to protect a security interest, and is not an "owner" of foreclosed-on property for purposes of complying with the UST regulatory program. Under the "bright line" test a holder must, within 12 months following foreclosure (as defined herein under the section entitled "Foreclosure"), list the property with a broker, dealer, or agent who deals with the type of property in question, or advertise the property as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the property in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located. If the holder satisfies these criteria, the holder is considered to have complied with the requirement in this rule that it is seeking to sell or otherwise divest the property in an expeditious manner. A holder choosing to avail itself of this bright line test will be able to provide clear and unambiguous evidence that it is not the UST or UST system's "owner" following foreclosure, for purposes of complying with the UST regulatory program.

EPA also recognizes that market conditions, the condition of the property, and other factors may mean that despite reasonable efforts to expeditiously sell or divest foreclosed-on property, the property may not be quickly sold. Therefore, this regulation does not impose a time requirement for the ultimate disposition of foreclosed-on property. Provided that the property is being actively offered for sale by the holder and no offers of fair consideration are ignored, outbid, or rejected, foreclosed-on property may continue to be held by the holder without the holder being considered an "owner" of the UST or UST system or facility or property on which the UST or UST system is located.

In the proposed rule, EPA proposed that in order for a holder to avoid losing the protection of the security interest exemption, the holder must act upon a written, *bona fide,* firm offer of fair consideration for the property within 90 days of receipt of the offer. A few commenters expressed a concern that 90 days would not provide a holder enough time to complete such a transaction in cases where the purchaser undertakes a site assessment before finalizing the transaction. The Agency has maintained the same language as that contained in the proposed rule, but wants to clarify that the requirement to "act upon" an offer does not mean that a purchase transaction must be completed with the 90-day time period. Rather, the holder must consider the offer, which may include, but is not limited to, responding to the offer and/or initiating a purchase transaction within 90 days. If at any time after six months following the acquisition of marketable title the holder outbids, rejects, or does not act upon within 90 days of receipt of, a written, *bona fide,* firm offer of fair consideration for the property, the holder will lose the protection of the rule. Under this rule, a "written, *bona fide,* firm offer" is a legally enforceable, commercially reasonable, offer, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. Where a holder outbids, rejects, or fails to act upon an offer of fair consideration, the holder is considered, for the purpose of this regulatory exemption, to be maintaining its indicia of ownership in the property as protection for investment purposes, and not as security for the obligation.

(5) Winding up operations after foreclosure. In addition, in the post-foreclosure context, this rule provides that a holder that forecloses on an UST or UST system with ongoing operations may wind up the UST or UST system's operations without also being considered to be participating in management. Winding up is considered a protected activity by a foreclosing holder because, without such protection, foreclosure would not be possible where practical or commercial necessity dictates that the foreclosing holder undertake such actions. "Winding up" in the post-foreclosure context includes those actions that are necessary to close down an UST or UST system's operations, secure the site, and otherwise protect the value of the foreclosed assets for subsequent sale or liquidation. In winding up an UST or UST system, a holder may undertake all necessary security measures or take other actions that protect and preserve an UST or UST system's assets, including steps taken to prevent or minimize the risk of a release or threat of release of the UST or UST system's contents.

F. Liability of a Holder as an Operator of an Underground Storage Tank or Underground Storage Tank System

While the Subtitle I security interest exemption excludes a holder from the definition of "owner" for regulatory

compliance purposes, the statute does not explicitly address a holder's responsibilities as an UST or UST system "operator." EPA recognizes that the absence of explicit language in the security interest exemption regarding a holder's responsibility for the Subtitle I requirements as an "operator" creates a potential problem for holders, since [*46703] EPA's UST regulations (as described in Section II of this preamble) apply to both owners and operators of underground storage tanks.

Some concern was expressed by commenters regarding the absence in the proposed rule of an outright exemption for holders from the definition of "operator" and the potential liability to which a holder could be exposed by engaging in any affirmative action in respect to an UST or UST system. EPA believes that Congress did not grant holders an outright exemption to the term "operator" in the Subtitle I security interest exemption because it may have wanted to ensure that holders did not engage in the day to day operations of the UST or UST system. The Agency believes this intent can be inferred from the statutory requirement that a holder may not "participate in the management" of the UST or UST system without voiding the exemption. EPA realizes that in order to provide meaning to the exemption, however, it is important to define how a holder can acquire title and access to an UST or UST system or facility or property on which an UST is located, and take affirmative actions to protect the value of their security interest, without losing the protection of the security interest exemption. Consequently, this regulation provides a road map that ensures that holders can utilize the security interest exemption, while reflecting the intent that exempted holders be prohibited from operating USTs or UST systems. The following sections discuss the actions that a holder can and cannot take to remain within the protective ambit of the regulatory security interest exemption.

1. Pre-Foreclosure Operation

Prior to foreclosure, it is the borrower, not the holder, who generally is in control of, or has responsibility for, the daily operation of an UST or UST system, and is subject to the full range of requirements applicable to operators of USTs. During this time period, a holder is permitted to conduct those activities related to its financial and administrative obligations of managing a loan portfolio, as well as environmental compliance activities and activities undertaken voluntarily to protect human health and the environment in compliance with 40 CFR part 280. The holder in this position will not lose its ability to take advantage of this regulatory exemption as a result of engaging in these activities. If the holder becomes engaged in the daily operation of an UST or UST system, however, it becomes subject to the full range of requirements applicable to operators of USTs or UST systems.

2. Post-Foreclosure Operation

Once a holder has foreclosed on an UST or UST system or facility or property on which the UST or UST system is located, it displaces the borrower and could become engaged in the day-to-day operation of an UST or UST system merely by storing product in the UST or UST system. EPA considers an UST to be in use and in operation if petroleum is added to, dispensed from, or stored in the UST. Therefore, except as provided in this rule, a holder cannot continue to use, store, dispense, or fill petroleum in an UST or UST system after obtaining marketable title and access to the UST or UST system or facility or property on which the UST or UST system is located without incurring Subtitle I liability (unless there is another operator available, as described later in this section). That does not mean, however, that a holder is barred from taking affirmative actions to ensure that a tank is no longer in use, by demonstrating that the tank is no longer storing, dispensing or being filled with petroleum. The holder best demonstrates this by emptying tanks it acquires through the foreclosure process. Thus, in order to qualify for the exemption, it is essential for a holder to empty all tanks that it knows about or should know about shortly after undertaking foreclosure (the time period following foreclosure is discussed later in this section), unless there is another operator who takes responsibility for complying with 40 CFR part 280 (as described later in this section). An UST or UST system is empty-in accordance with § 280.70-when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight, of the total capacity of the UST system, remain in the system. Stated simply, this means that all product must be removed from the UST or UST system so that only one inch of residue remains. To ensure that the UST system has been adequately secured, vent lines must be left open and functioning, and

all other lines, pumps, manways, and ancillary equipment must be capped and secured (§ 280.70).

Several commenters expressed concern about a blanket requirement for holders to discontinue operation of an UST or UST system upon acquisition of the UST or UST system through foreclosure, particularly if a lessee or other tenant was present at the site. In response to these commenters concerns, EPA believes that tanks can remain in use if there is someone who is available to take responsibility as an operator for compliance with the Subtitle I requirements. There may be situations, for example, when a lessee is willing to continue operating an UST or UST system as the "operator," in compliance with Subtitle I, while a holder is in possession of the UST or UST system or facility or property on which the UST is located. In some instances, the holder may want to arrange for a different person to operate the UST or UST system, for example, when the existing lease expires. In those cases where an operator (other than the holder) exists who is in control of and has responsibility for the daily operation of the UST, and who can be held responsible for compliance with 40 CFR part 280 requirements, the holder would not be considered the operator. Under these circumstances it is not necessary, in order to retain the security interest exemption, for a holder to empty the tanks for which it is knowledgeable about upon foreclosure, or to empty tanks that it becomes knowledgeable of later. (The issue of known and unknown tanks is discussed later in this section.)

In foreclosure, to avoid being an "operator" of the UST, in addition to emptying and securing the UST or UST system, a holder must also comply with the Subtitle I requirements for either temporary or permanent closure, in order to retain the security interest exemption. A holder who chooses to permanently close its UST or UST system, must do so in accordance with §§ 280.71 through 280.74, Subpart G-Out of Service UST Systems and Closure, except the holder is not required to perform corrective action if contamination is discovered. A holder who chooses to temporarily close its tanks is required to maintain corrosion protection and report any known or suspected releases from the UST system. In accordance with § 280.70(a), release detection is not required as long as the UST system is empty. A foreclosing holder who fails to satisfy the conditions established in this rule for retaining the security interest exemption could be an "operator" under the Subtitle I regulations and would therefore be subject to the full panoply of Subtitle I regulatory obligations applicable to all operators of tanks, including the corrective action regulations.

a. Costs of post-foreclosure temporary closure conditions. A few commenters expressed concern that the costs associated with the proposed rule's post-foreclosure conditions to empty tanks and enter temporary closure [*46704] would prevent lenders from making UST-related loans. EPA does not believe that the costs associated with performing these actions are significant, compared to the cost of alternatives that holders would otherwise face.

First, in the absence of this regulatory exemption, as an "operator" upon foreclosure, a holder would have to comply with the UST technical standards in some manner. Entering temporary closure is one way to comply with the UST technical standards. The only condition placed upon a holder by this rule that differs from what normally constitutes temporary closure under the technical standards is the requirement for emptying tanks. The estimated total cost of emptying one tank and draining the associated pipes is $ 950. $ 350 of this cost is attributed to the mobilization of a truck for fuel disposal, which remains a fixed price per site. The total estimated cost per four-tank facility is $ 2750 ($ 600 per tank, plus $ 350 for the truck). The total cost for securing the lines is estimated at $ 225 per facility. These costs could be as much as the cost for release detection for tanks that a holder does not empty and that remain in use, estimated at up to $ 2800 for a four-tank facility. Under the requirements in 40 CFR § 280.70 for temporary closure, an owner or operator is allowed to either empty and secure its tanks, or perform release detection. While this regulatory exemption restricts a holder's choice to emptying and securing its tanks, no new costs are imposed upon the holder, since without this rule, the holder would have to pay approximately the same cost, whether it chose to empty its tanks or maintain release detection. For further information regarding the costs of emptying tanks and securing lines, please see the "Background Document in Support of the Lender Liability Rule for Underground Storage Tanks Under Subtitle I of the Resource Conservation and Recovery Act" located in the UST Docket at 401 M Street, SW., room 2616, Washington, DC 20460.

b. Time frame for emptying USTs and securing UST systems EPA received the most comments regarding the period of time allowed to demonstrate that a holder is no longer storing product, and thereby no longer operating an

UST or UST system. All but one person who commented on the 15-day time frame in the proposed rule maintained that 15 days was not enough time to empty tanks and complete temporary closure after foreclosure. EPA proposed 15 days originally because our research indicated that only seven days should be necessary to empty the tanks and secure the lines at an UST facility once a contractor had been selected. Another seven days was added to provide time for the holder to become familiar with the details of this regulatory exemption and identify a qualified contractor. The Agency is obliged by the regulatory authority under section 9003(b), 42 U.S.C. 6991b(b) of Subtitle I to promulgate regulations based not only upon the technical capability of owners and operators, but also upon what is necessary to protect human health and the environment. It is therefore incumbent upon the Agency to select the shortest time period needed by a holder to empty tanks and secure lines.

Commenters listed a variety of reasons why more time would be needed for emptying tanks, including: special problems associated with rural communities such as long distances-travel time and locating a qualified contractor; snow, ice and other inclement weather conditions (thick snow and/or ice can make tanks difficult or impossible to detect and empty during winter months); contracting delays related to difficulties in locating, scheduling and negotiating a price with a contractor, and in some cases, in obtaining various bids; banks' (especially small banks') unfamiliarity with EPA regulations; multiple tanks at large facilities; laboratory testing requirements imposed by some states; and finding alternative storage arrangements, especially for non-marketers. Government agencies, acting in a receivership capacity, could face special difficulties due to protracted contract bidding requirements. Recommendations proposed by commenters, due to these various delays, ranged from 30 to 140 days.

Based on these commenters' concerns and information that they provided, the Agency has concluded that 60 calendar days is a reasonable, minimum period of time after undergoing foreclosure, as that term is defined under section III. C. 5. of this preamble, to allow a holder to empty its known tanks (see discussion of unknown tanks later in this section). This decision is based upon the following estimated time frame developed from information received by commenters: approximately one week to become familiar with Subtitle I and the details of this regulatory exemption, and to locate all USTs and the extent of the UST system on the foreclosed property; 5 weeks to complete a contractor bidding process and hire a qualified contractor, perform laboratory tests if necessary (accounting for travel time and weather delays), and apply for and obtain approval for content disposal if required by the state; two weeks to schedule contractor and for contractor to perform and complete work related to emptying all USTs and securing the UST system (accounting for travel time, other commitments and weather delays).

EPA also recognizes that the time needed for a holder to empty its tanks and secure its UST system may vary based upon the holder's geographic location. Extreme weather conditions in areas such as Alaska, special problems associated with rural communities, and additional requirements imposed by some states, may pose special problems for holders attempting to empty tanks in an expeditious manner. Thus, holders in some states may need more than 60 days to empty their tanks and secure their UST systems. Therefore, EPA believes that the implementing agency should have the ability to select a time frame that it finds most appropriate for holders, either based upon individual holders' needs (case-by-case determination), or based upon a standard time frame for all holders under the jurisdiction of that implementing agency. Thus, a holder who wishes to take advantage of this regulatory exemption, must empty its known tanks within 60 days after foreclosure or within 60 days after the effective date of this rule, whichever is later, or within another reasonable timeframe as specified by the implementing agency.

c. Unknown Tanks. Many commenters noted that a holder may not know of the existence of an UST when, through foreclosure, it acquires title to an UST or UST system or facility or property on which an UST or UST system is located. Several examples were provided by commenters demonstrating the problems associated with identifying all the USTs that may be located on a property it acquires. Among the examples, commenters stated that USTs may not be registered with the state, or it may be difficult for a holder to know of the existence of an UST on agricultural property or on other non-fuel-marketer properties. Sometimes the borrower does not disclose the existence of any USTs or the exact number and location of the USTs. Even if the holder is aware that USTs may be located on the property, it may encounter difficulty in identifying the USTs' exact locations. This could be especially difficult when a site is covered with snow or ice during the winter. Furthermore, USTs are sometimes hidden under asphalt or even under buildings.

Performing an environmental assessment or audit is no guarantee that USTs will be found. As one commenter asserted, even a phase II [*46705] site assessment could fail to indicate the presence of USTs.

Several commenters urged EPA to adopt a more practical approach to emptying tanks that may not be discovered by the holder until after the 60-day time period following foreclosure. EPA believes that unless a holder is allowed to empty a tank upon discovering it, rather than potentially losing the protection of the regulatory security interest exemption if it fails to identify and empty all its tanks within 60 days after foreclosure, holders will remain suspicious of extending credit to UST owners and operators, undermining the purpose of this rule. Therefore, a holder can remain within the protective ambit of this rule by emptying an unknown UST within 60 days after discovering it or within 60 days after the effective date of this rule, whichever is later, or within another timeframe as specified by the implementing agency.

d. Permanent closure. A number of commenters objected to EPA's proposal pertaining to holders who had not disposed of the UST or UST system or facility or property on which the UST or UST system is located, within 12 months after foreclosure. The Agency proposed that in order for these holders to maintain the regulatory exemption, they must either enter permanent closure if they failed to dispose of the UST or UST system 12 months after foreclosure, or perform a site assessment and apply for an extension of temporary closure from the implementing agency. Several commenters doubted that they would be able to sell properties with USTs within 12 months. They argued that permanent closure would be burdensome and unnecessary to protect human health and the environment, since the requirement to empty the UST would eliminate the threat of contamination from further releases from the UST.

Commenters also insisted that holders do not possess the technical capacity of the average UST owner or operator, so they should not have to enter permanent closure to retain the exemption. Furthermore, commenters did not believe that it was appropriate for a holder, who acts as a temporary custodian of the UST or UST system, to decide the ultimate fate of a facility (whether to take the tanks permanently out of operation). Rather, they asserted, that decision should be left up to the subsequent purchaser. As one commenter stated, total closure could severely hinder a holder's selling opportunities and eventually remove the property from the mainstream of commerce. Although the proposed rule offered holders the option of applying for an extension of temporary closure from the implementing agency, some states prohibit such extensions, which would leave holders in those states without any option other than permanent closure of the tanks.

EPA agrees with commenters that the decision regarding whether or not a tank should be permanently closed should generally be left with whoever purchases the UST or UST system or facility or property on which the UST is located from the holder. The Agency has concluded that USTs that are emptied, secured and placed in temporary closure for the temporary period of time for which they are possessed by a holder should not need to be permanently removed or permanently closed in place in order to protect human health and the environment. Therefore, in this final rule, a holder may retain the regulatory exemption by temporarily closing but not permanently closing its USTs and UST systems. However, if a holder is unable to dispose of an UST property within 12 months, it must conduct a site assessment if the USTs are older and do not meet new tank performance standards (discussed later in this section). EPA believes that it is important for a holder to conduct such an assessment in order for the implementing agency to determine if there is any contamination on the site, and if so, make a determination regarding the potential amount of risk posed to human health and the environment and whether that risk warrants the implementing agency taking corrective action. (While this rule precludes a holder's liability for corrective action costs if the holder retains its eligibility for the exemption as provided in the rule, the implementing agency can undertake corrective action measures on the holder's site based upon its assessment of the risks posed by any contamination identified there.) As in the case of other temporarily closed tanks, in order to maintain protection of human health and the environment, contamination should not be allowed to remain unidentified for more than 12 months after an UST or UST system has been taken out of service (or in this case, more than 12 months after foreclosure, as that term is defined under § 280.210(c) of this rule). For purposes of this provision, the 12-month period begins to run from the effective date of the rule or from the date on which the UST or UST system is emptied and secured, whichever is later.

The Agency does not consider the site assessment condition to be unduly burdensome for several reasons. First, a holder will only need to perform a site assessment if the USTs that the holder has acquired have not been upgraded or replaced to meet the requirements of § 280.20 for new UST systems or § 280.21 for upgraded systems, or if no external release detection method is in operation. Many of a holder's USTs should be upgraded or replaced since many of the loans that UST owners and operators are requesting are expected to be used for upgrading or replacing substandard tanks. Furthermore, after 1998, all tanks are required to be upgraded or replaced, so holders should encounter few substandard USTs after that time. A site assessment can also be averted if one of the external release detection methods allowed in § 280.43 (e) or (f) is operating at the end of the 12-month period, and the release detection method operating indicates that no release has occurred.

The Agency is also aware that conducting a site assessment during property transfers has become a standard business practice and that few property transactions currently take place without one. If a holder should have to bear the cost of performing a site assessment, that cost may in some cases be passed on to the subsequent purchaser, and in some states, the holder may be reimbursed for the cost of performing a site assessment through the state's petroleum assurance fund or through other assistance programs. While EPA cannot require states to pay or reimburse a holder for performing a site assessment (or for undertaking any other actions that would protect the environment, such as corrective action), the Agency encourages states to provide assistance to holders who wish to engage in environmental compliance activities or voluntary environmental actions in order to protect their security interest.

3. Release Reporting Requirements Following Foreclosure

Under today's rule, upon foreclosure, a holder taking advantage of the regulatory exemption from corrective action regulations must nevertheless comply with the requirement in § 280.50 that the discovery of any releases from the UST be reported to the implementing agency. Only the reporting requirement must be followed; the holder need not comply with § 280.52, despite the reference to that provision in § 280.50. The release reporting requirement of § 280.50 is part of Subpart E, which details the obligations for reporting known or suspected releases, investigating off-site impacts, confirming that a release has occurred, and cleaning up spills and [*46706] overfills. While Subpart E generally implements Subtitle I's corrective action and site investigation requirements, from which a holder may be excluded under today's rule, § 280.50 has historically been viewed by EPA as part of the UST technical standards.

A holder is responsible, following foreclosure, for reporting to the implementing agency, any discovery of released regulated substances, or any suspected release at an UST site or in the surrounding area. Such reporting is considered necessary to ensure protection of human health and the environment. By the holder's informing the implementing agency of a release, the implementing agency can then determine the appropriate response action, if any.

In the absence of today's rule a holder, as an UST operator, would have to perform release investigation and confirmation in accordance with §§ 280.51 through 280.53. Under today's rule, a holder who chooses to take the tank(s) out of service as described in this rule is required to follow the procedures established in § 280.50 but is not subject to the release investigation and confirmation requirements in §§ 280.51 through 280.53. A holder who elects to keep the tank(s) in operation, however, is obligated to comply with all of the Subpart E requirements, including those related to release investigation and confirmation, and corrective action.

G. Financial Responsibility Requirements

RCRA § 9003(c), as implemented by EPA at 40 CFR Part 280 Subpart H-Financial Responsibility, requires owners or operators of petroleum USTs to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental UST releases. As discussed earlier under Section III. A. of this preamble, EPA is defining, for purposes of its Subtitle I corrective action and technical requirements, the term "owner" to mean that a holder who maintains ownership rights in an UST or UST system primarily to protect a security interest does not rise to the level of a full "owner," and therefore is not subject to compliance with those regulatory requirements. As described earlier, this approach to EPA's regulatory program is

consistent with the Subtitle I statutory security interest exemption. Similarly, a holder is not subject to the financial responsibility requirements as an UST owner.

The Agency is also exempting a holder as an UST "operator" from the financial responsibility requirements, provided the holder satisfies the conditions contained in this rule. Before a holder takes possession of an UST or UST system, a holder is not considered an UST operator, for purposes of EPA's technical and financial responsibility regulations, if it is acting merely as a holder and is not in control of the daily operation of the UST or UST system. Therefore, a holder typically is not subject to the UST financial responsibility requirements of 40 CFR Part 280 Subpart H as an operator prior to foreclosure.

Under this rule a holder is exempted from corrective action as an operator after foreclosure if it ensures that its tanks no longer store petroleum and it complies with the temporary or permanent closure requirements specified in this rule. (See Section III. F. 2. of this preamble). In these situations, where the holder is not liable for corrective action and where the tanks are empty and pose little threat of release, it would serve no useful purpose to require a holder to demonstrate compliance with the financial responsibility requirements for corrective action. Therefore, the Agency is exempting holders who satisfy all the other requirements in this rule from demonstrating Subtitle I financial responsibility for UST corrective action.

A holder's responsibility for demonstrating UST financial responsibility for third-party bodily injury and property damage compensation poses a different issue. While RCRA Subtitle I does not include provisions that actually impose third-party liability upon UST owners and operators, it does require UST owners and operators to demonstrate their ability to compensate third parties for bodily injury and property damage caused by accidental releases arising from the operation of an UST or UST system. The Agency believes that a holder who complies with all the conditions set forth in today's rule should not be required to comply with any of the UST financial responsibility requirements as an owner or operator, including those for both corrective action and third-party liability coverage. This regulatory exemption is consistent with the interpretation of that language adopted in the preamble to the UST financial responsibility final rule (53 FR at 43323). In that rule, EPA exempted tanks taken out of operation prior to the effective date of the rule from UST financial responsibility compliance. In the preamble to the final rule, EPA recognized that "insurance providers would be extremely reluctant to assure tanks taken out of operation because of the perceived greater uncertainty associated with them" (53 FR at 43327). In particular, insurers have indicated that in the case of foreclosed USTs, they would be concerned about vandalism and other threats to USTs at non-operational, unattended gas stations or similar locations with public access. The preamble also states that "even if providers of assurance would assure these tanks, it is unlikely that they would cover leaks which occurred before the effective date of the policy" (53 FR at 43327).

A similar situation exists for holders who empty their tanks and enter temporary or permanent closure after foreclosure. EPA has discovered that it is practically impossible to obtain third-party environmental insurance coverage for a new owner of empty tanks. Providers of financial assurance are reluctant to provide any coverage for tanks that no longer store petroleum product. Further, providers are reluctant to provide coverage for damages that occur after the effective date of the policy for releases that might have occurred prior to the effective date of the policy. Under this rule a holder is required to empty its tanks in order to be exempt from corrective action regulatory requirements. Since providers are unlikely to provide any coverage for empty tanks at non-operational facilities or for releases that occurred prior to foreclosure, and since third-party damages would be extremely unlikely to stem from releases occurring after the holder forecloses on and empties its tanks, the Agency believes it is unnecessary to require third-party liability coverage for such tanks.

RCRA § 9003(c)(6) supports this regulatory exemption. That provision emphasizes the connection between the UST financial responsibility requirement and a tank's operational status: "The regulations promulgated pursuant to this section shall include: * * * (6) requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank." [emphasis added.] The Agency believes that since a holder must demonstrate that its tanks are empty and that it is complying with the UST temporary or permanent

closure requirements in order to avoid corrective action liability as an operator, there should be no need for a holder who meets these requirements to demonstrate financial responsibility for corrective action or third-party damages. By requiring the holder to empty the [*46707] tank in order to be exempt from corrective action requirements, EPA is ensuring that damages caused by future releases from that tank will be minimized if not avoided altogether. As a result, holders who act in accordance with the requirements described in this rule are exempt from all Subtitle I financial responsibility requirements.

H. State Implementation and State Program Approval

EPA received numerous comments regarding the problems associated with the absence of lender liability provisions in many states, as well as the problems generated by the variety of state UST lender liability provisions that currently exist. Some commenters argued that the only way to make today's rule effective would be for EPA to require states to enact state legislation regarding UST lender liability. Other commenters specifically addressed state program approval requirements and state clean up funds. In general, the comments indicate that several misconceptions exist regarding the role of state programs in implementing Subtitle I, the state program approval process and state clean up funds.

First, as many commenters pointed out, today's rule only affects federal UST requirements, and only provides an eligible holder protection against federal enforcement actions. Since the UST program is implemented primarily through the states under state laws, a holder can be afforded protection against UST liability at the state level only if the state has enacted its own lender liability legislation, regulations, or policies.

Several states have already enacted laws or regulations containing UST lender liability provisions. In many states without existing lender liability provisions, state legislatures are debating lender liability bills. While EPA can encourage states to enact UST lender liability provisions, the Agency does not have the authority to require that states adopt such provisions. Therefore, the Agency strongly urges those states without security interest exemptions to enact legislation similar to what is included in today's Federal rule. EPA believes that such action is crucial in the effort to increase the availability of capital to UST owners and operators.

Several comments submitted to EPA addressed state program approval and whether or not states could broaden protections for holders. A state's lender liability legislation or regulations may affect the state's program approval and states need to be cognizant of that relationship when considering the enactment of a security interest exemption.

UST state program approval, as provided for under RCRA Subtitle I § 9004, and as implemented by 40 CFR part 281, provides states the ability to operate an UST regulatory program in lieu of the federal program if they first submit the program for review and receive approval from EPA. EPA approval of a state program means that the requirements in the state's laws and regulations will be in effect rather than the federal requirements. Program approval ensures that a single set of requirements (the state's) will be enforced in that state, thus eliminating the duplication and confusion that can result from having separate state and federal requirements. EPA considers state program approval to be an integral part of the UST regulatory program.

EPA's approval review focuses primarily on the basic state authorities (laws and regulations) needed to achieve the underlying objectives of the federal regulations covering the UST technical standards, corrective action, and financial responsibility requirements. The UST state program approval process is also based upon a performance-oriented approach. The statutory test for an approvable state program is that it be "no less stringent" than the federal requirements and include as many categories of UST systems (or be as broad in scope) as the federal requirements. EPA reviews the state's specific statutory and regulatory provisions as well as their interpretation by the Attorney General of the state.

Enactment of lender liability legislation or regulations is not a requirement for receiving or maintaining state program approval. A state program without a security interest exemption is acceptable under EPA's state program

approval requirements, since failure to have such a provision would not narrow the scope of the state program, nor render it "less stringent" than the federal program. However, in order to fully effectuate the purpose of today's rule in expanding capital opportunities to UST owners and operators, EPA recommends that states act promptly to enact secured creditor provisions.

If a state program includes an UST security interest exemption, EPA will evaluate it against the criteria in § 281.39 of this rule. A state program that exempts a holder from UST requirements as an owner and operator may be approved if: The holder is maintaining indicia of ownership primarily to protect a security interest in a petroleum UST or UST system; the holder does not participate in the management or operation of the UST or UST system; and the holder does not engage in petroleum production, refining, and marketing. The state's program application should address the issue of UST lender liability in the "Scope" section of its state program description, under § 281.21 of the State Program Approval regulations.

A state may encounter program approval conflicts if it enacts a lender liability provision that is broader in scope or less stringent than today's federal lender liability rule. However, this rule should not present a barrier for states to receive state program approval. The program approval requirements contained in this rule are intended to provide enough flexibility to allow states to enact various UST lender liability provisions without jeopardizing their ability to receive or maintain approval of their state program.

I. Holders' Access to State Funds

EPA received several comments regarding a holder's ability to apply for state cleanup funding to remediate an UST property acquired through foreclosure. Some commenters also expressed concern about a holder's ability to access other state assistance programs intended for UST owners and operators. While the EPA cannot require states to ensure that holders are included among those eligible for a state's cleanup fund, reinsurance program, loan or grant program, today's rule is not intended to prohibit or discourage states from allowing holders access to these programs.

A few commenters highlighted the confusion that exists regarding the association between EPA's financial responsibility requirements and the state cleanup funds. EPA believes that it is important for holders to understand the purpose of state cleanup funds, the relationship between EPA and these state funds, and the relationship between the financial responsibility requirements and state cleanup funds.

As described earlier under section II. C. of this preamble, the financial responsibility requirements were promulgated to ensure that UST owners and operators demonstrated their ability to pay the costs of conducting remediation and compensating third parties for injuries or damages due to UST contamination. There are an array of acceptable financial responsibility compliance mechanisms, including insurance, guarantees, letters of credit, surety bonds, fully-funded trust funds and state assurance funds. State assurance or cleanup funds have become the most common and low cost financial responsibility compliance [*46708] mechanism for tank owners and operators. As described earlier in this preamble under section III. G., holders who are eligible for today's regulatory security interest exemption are not responsible for demonstrating financial assurance. However, as noted by commenters, many holders would like to obtain access to state cleanup funds to voluntarily remediate any contamination that might be located on an UST property they obtain through foreclosure in order to protect human health and the environment, and make the property more attractive to potential purchasers. Some commenters were concerned that the proposed lender liability rule would have the unintended effect of blocking such access.

State cleanup funds have been established in many states to assist UST owners and operators in performing corrective action. States may apply to EPA for approval of its cleanup fund as a financial assurance mechanism. States are not, however, required by law or regulation to establish a cleanup fund or any other state UST assistance program, or to submit the fund to EPA for approval.

Each state fully controls how its fund functions. No two state cleanup funds are identical; they vary in the amounts

and types of coverage provided, in their eligibility requirements, in the amount of funding, funding source, method of payment, and program implementation. EPA's understanding is that currently, holders are eligible to apply for state cleanup fund monies in some states and not in others. That situation will likely continue upon promulgation of this rule, as this rule is not intended to alter the eligibility of holders to apply for state cleanup fund monies. While EPA cannot require that states provide holders access to these funds, EPA encourages states to recognize the benefits associated with remediating UST properties held by holders in terms of increased protection of human health and the environment, and the enhanced ability to return these properties to productive use.

J. Outstanding Loans and Loans in Foreclosure Upon the Effective Date of the Rule

In the proposed rule, EPA requested comments regarding how the potential liability associated with a holder's current holdings acquired through foreclosure could affect the extension of future UST-related loans. Many commenters expressed their concern that financial institutions would be unwilling to extend loans to properties containing USTs if those institutions incurred significant costs in relation to properties on which they had already foreclosed. Several commenters also insisted that the Subtitle I security interest exemption was not intended by Congress to be contingent upon EPA's exercise of its rulemaking authority. These commenters noted that a rule that does not include a holder's current UST holdings would effectively void the secured creditor exemption that has been part of RCRA since 1986, thereby denying holders the protection that Congress provided in the law. Commenters also expressed concern that failure to include in the exemption a holder's outstanding loans in foreclosure would create the need for a cumbersome recordkeeping system, in which holders would have to keep track of whether foreclosures occurred prior to or after the effective date of the rule. Commenters also indicated that enforcement would be hampered unless states began requiring holders to report the date on which foreclosures occur, as defined under § 280.210(c). They stated that such a reporting requirement would add an additional burden on security interest holders, not intended by Congress' statutory exemption for security interest holders.

In addition, several commenters mentioned the benefits that would be afforded the environment by including outstanding loans within the exemption's protective ambit. For example, commenters stated that holders would be encouraged to empty USTs and undertake voluntary cleanups on currently foreclosed properties containing USTs if such properties were included in the rule.

Based on the comments received, EPA has concluded that there is sufficient evidence to indicate that the intent of the rule in expanding credit opportunities for UST owners and operators would be undermined if the rule does not cover holders of existing security interests and holders of security interests already in foreclosure upon the effective date of the rule. Furthermore, such protection for holders could provide additional environmental benefits; by encouraging holders in foreclosure at the time the rule is issued to empty their tanks, contamination will be curtailed at numerous UST sites throughout the country. Therefore, holders of existing as well as future security interests, including those in foreclosure upon the effective date of this rule, fall within the rule's protective ambit as long as the holder satisfies the conditions contained in this rule for the regulatory security interest exemption.

IV. Issues Outside the Scope of This Rule

A. Petroleum Producers, Refiners, and Marketers

Several commenters requested that the security interest exemption be expanded to cover petroleum producers, refiners, and marketers who hold indicia of ownership primarily to protect a security interest. They claimed that a petroleum marketer who extends loans to UST owners is no different than a financial institution that extends loans to UST owners, except that a marketer's experience in the petroleum industry helps it avoid unsound practices that lead to foreclosures. Commenters further stated that these "petroleum marketer-creditors" supply loans to many small businesses that cannot get loans elsewhere, and that without an exemption for petroleum producers, refiners, and marketers, capital from these sources would dry up.

The statutory exemption for security interest holders in Subtitle I specifically excludes petroleum producers, refiners, and marketers. Since the Subtitle I security interest exemption excludes petroleum producers, refiners, and marketers, the Agency has not extended the regulatory exemption to these persons.

EPA disagrees with commenters who stated that small businesses will be harmed by today's rule. To the contrary, the Agency expects this regulatory exemption to increase the total amount of capital available to small businesses, who are currently most in need of capital for UST improvements. Financial institutions, currently reluctant to make UST-related loans to small businesses should, as a result of this rule, greatly increase the total availability of capital for UST owners who are otherwise credit worthy.

Although holders who engage in petroleum production, refining, and marketing are not covered by this regulatory exemption, they should not expect to automatically be held liable for cleaning up contamination caused by a borrower. Under the federal UST regulations, such a holder would need to meet the regulatory definition of either "owner" or "operator" of the UST in order to be potentially liable for contamination caused by the UST. A determination as to whether or not a holder who engages in petroleum production, refining, and marketing is responsible for UST cleanup costs as an owner or operator will be based on the individual circumstances of the case, as has been the situation in the past. Thus, this rule does not affect the current liability scheme for holders who also [*46709] engage in petroleum production, refining, and marketing. As a result, EPA does not believe that capital from these sources will "dry up" as some commenters stated.

A few commenters were confused about the effect of the rule upon a holder's ability to extend capital to or foreclose on an UST property that was used by a borrower to produce, refine, or market petroleum. EPA believes that the restriction in the statutory security interest exemption was intended to prevent petroleum producers, refiners, and marketers from personally employing the exemption. Thus, the restriction in the exemption allows holders who do not engage in petroleum production, refining, and marketing to hold a security interest in an UST or UST system for a borrower who engages in these areas of business.

B. Third Party Liability

Several commenters addressed the issue of a holder's protection from third party actions. In general, these commenters requested that the final rule provide protection for holders from UST litigation initiated by private parties (i.e., private legal actions not involving the United States government). Since RCRA Subtitle I does not impose liability pertaining to third parties, EPA has not addressed third party liability in this rule. Third parties who wish to recover UST regulatory compliance and corrective action response costs may have a cause of action against holders under various provisions of federal and state law, other than Subtitle I of RCRA.

While this rule cannot offer protection for holders from every conceivable type of liability related to UST contamination on properties held by holders to protect a security interest, it specifies the types of activities that holders may engage in while remaining within the protective ambit of the Subtitle I security interest exemption. In so doing, it provides certainty for holders whose primary concern is fear of being held liable by the federal government under relevant UST statutes and regulations-not third-party actions.

C. Trustee and Fiduciary Liability Under Subtitle I

EPA received a number of comments requesting that the security interest exemption be expanded to cover trustees and fiduciaries acting in a fiduciary capacity. Commenters stressed the importance of providing the trust operations of a financial institution protection from RCRA Subtitle I liability. They expressed concern that the financial institution or individual financial officer acting as a trustee or fiduciary could face personal liability under RCRA Subtitle I if any or all of a trust's assets are contaminated by an UST release. Commenters asserted that they should not be held personally liable for the cleanup of trust properties because prior to their appointment as trustee or fiduciary they would have no way of knowing whether the trust's property was contaminated, nor would they have been able to have prevented the

contamination. They maintained that protection for all areas of a financial institution's operations was crucial to stimulate more credit for small businesses to upgrade and improve their UST systems. Commenters further stated that a large environmental expense on the trust side of a financial institution would have a significant, negative effect upon UST-related lending on the commercial side.

EPA carefully considered the comments received regarding this issue, but has not provided the specific relief requested by commenters. Since the primary purpose of this rule is to expand the availability of capital to UST owners by encouraging lenders to make loans to credit-worthy UST owners, it is appropriate for EPA to provide an exemption for holders of security interests on UST-related loans. The Agency is not convinced, however, that it is necessary to extend the exemption to other persons, such as trustees, who, in their capacity as trustee, are not involved in making UST-related loans to tank owners.

The Agency believes that in most instances, however, the liability of a trustee may be limited by the operation of existing trust law. While acknowledging the complexities of trust law as well as numerous jurisdictional variations, EPA believes the concepts described in the Restatement (Second) of Trusts (1959) n4 provide a fair representation of the common law of trusts, and generally would be applicable to trusts involving underground storage tanks.

n4 The Restatement (Second) of Trusts (1959) is an authoritative summary of the law of trusts prepared by the American Law Institute. Although the Restatement is not codified into law, it is frequently used as a guide to interpretation by courts.

Under the well-established and generally accepted principles governing the obligations of trusts and the liability of trustees, as articulated in the Restatement, the trustee is technically personally responsible for the liability: "The trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of trust." Restatement (Second) of Trusts § 261. However, the rule of personal liability is tempered by a right to indemnification: "The Trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust." *ID.* § 244. Accordingly, the rule is that ordinarily the trustee may obtain indemnification from the trust assets for the acts within his or her official capacity. Thus, EPA believes that in most instances, a trust's assets would be available for cleanup of trust property contaminated by USTs.

D. Hazardous Substance Tanks

Several commenters noted that hazardous substance UST systems are regulated under Subtitle I, and indicated that the rule would be more useful if holders would not have to concern themselves with determining which USTs contained petroleum and which contained other substances. They requested that the rule also apply to USTs storing hazardous substances. Such a rule, reasoned one commenter, would better reflect the actual property inspection and examination process that holders undertake with respect to their collateral.

Today's regulatory exemption does not apply to non-petroleum, hazardous substance USTs or UST systems regulated under Subtitle I. The primary reasons for this are, first, the security interest exemption appears in one specific section of RCRA Subtitle I, titled EPA Response Program for Petroleum (see RCRA section 9003(h)). As the title indicates, the security interest provision applies to petroleum USTs and UST systems. Second, the primary purpose of this rule is to expand capital availability for small business petroleum UST owners and operators, particularly petroleum retailers. The Agency believes that a rule pertaining exclusively to petroleum USTs and UST systems will address the needs of this particular group of tank owners and operators.

E. Hazardous Waste Tanks

As explained under section III of this preamble, the RCRA Subtitle I security interest exemption specifically applies to USTs that are regulated under Subtitle I and that are used to contain an accumulation of petroleum. A few

commenters requested that EPA expand the exemption to include tanks storing hazardous waste as well.

Today's rule only addresses petroleum USTs regulated under Subtitle I of RCRA. Hazardous waste is regulated under Subtitle C of RCRA. Section 9001(2)(A) of Subtitle I explicitly excludes USTs containing [*46710] hazardous waste from regulation under Subtitle I. EPA derives its authority to develop today's rule in part from section 9003(h) of Subtitle I of RCRA-EPA Response Program for Petroleum. This authority applies exclusively to Subtitle I USTs and does not extend to the regulation of hazardous waste under Subtitle C. Thus, today's rule applies exclusively to EPA's RCRA Subtitle I UST program and does not affect any environmental requirements outside of the Subtitle I regulatory context.

F. Aboveground Storage Tanks and Heating Oil Tanks

A few commenters requested that in addition to petroleum USTs, the proposed regulatory exemption apply to aboveground storage tanks (ASTs) and heating oil tanks. Neither ASTs nor tanks used to store heating oil for consumptive use on the premises where stored are regulated under RCRA Subtitle I, although they may be regulated sometimes under other federal laws (e.g., the Oil Pollution Act) or state laws. Today's rule only addresses petroleum USTs regulated under Subtitle I of RCRA. The rule applies exclusively to EPA's RCRA Subtitle I UST program and does not affect any environmental requirements outside of the Subtitle I regulatory context.

While ASTs and heating oil tanks used for on-site consumption are excluded from the federal UST requirements, several states do regulate them. Under federal law, states are allowed to develop more stringent requirements, as well as requirements that are broader in scope than federal the ones. Thus, holders may find themselves responsible for certain state-imposed AST and/or heating oil tank requirements. States that are concerned about lender liability issues may choose to provide statutory and regulatory exclusions for holders that extend loans to borrowers who own or operate ASTs or heating oil tanks, particularly if it would have a positive influence on the ability of an UST owner or operator to obtain capital.

V. Economic Analysis

In the proposed rule, EPA requested that commenters furnish information that would help the Agency better understand how this regulatory exemption would affect an UST owner or operator's ability to comply with UST regulations. The Agency specifically requested information regarding the current interest rate charged for loans when property with one or more USTs is used as collateral. In addition, holders were asked about the extent to which credit might have been more available in the past if the rule had been in effect.

EPA did not receive any substantive comments or data regarding this request for information, and as a result, was unable to collect and analyze any new data that would assist the Agency in quantitatively evaluating further the rule's potential effects upon environmental protection and economic growth. For those interested in a more detailed discussion of the costs and benefits associated with today's rule, please refer to the "Background Document in Support of the Lender Liability Rule for Underground Storage Tanks Under Subtitle I of the Resource Conservation and Recovery Act," located in the OUST Docket at 401 M Street, SW., room M2616, Washington, DC 20460.

VI. Regulatory Assessment Requirements

A. Executive Order 12866

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], the Agency must determine whether the regulatory action is "significant" and therefore subject to review by the U.S. Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because it raises unique or novel policy issues. Therefore, this rule is subject to review by OMB. OMB, however, elected to waive its review of the final rule. Thus, no changes were made in the final rule in response to OMB recommendations.

B. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act of 1980, agencies must evaluate the effects of a regulation on small entities. If the rule is likely to have a "significant impact on a substantial number of small entities," then a Regulatory Flexibility Analysis must be performed. Because this rule may actually result in cost savings for small entities that hold security interests in USTs or UST systems, by lowering the cost and increasing the availability of capital for small business UST owners, EPA certifies that today's rule would not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

This rule does not contain any new information collection requirements under the provision of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

To the extent that this rule discusses any information collection requirements imposed under existing underground storage tank regulations, those requirements have been approved by the OMB under the Paperwork Reduction Act and have been assigned control number 2050-0068 (ICR no. 1360.04).

D. Unfunded Mandates Reform Act

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a statement to accompany any rule where the estimated costs to state, local, or tribal governments in the aggregate, or to the private sector, will be $ 100 million or more in any one year. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly impacted by the rule.

EPA has determined that this rule does not include a federal mandate that may result in estimated costs of $ 100 million or more to either state, local or tribal governments in the aggregate, or to the private sector.

List of Subjects in 40 CFR Parts 280 and 281

Hazardous substances, Insurance, Oil pollution, Reporting and recordkeeping requirements, Surety bonds, Water

pollution control, Water supply.

Dated: August 29, 1995.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble title 40, chapter I of the Code of Federal Regulations is amended as follows:
[*46711]

PART 280--TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 is revised to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 6991e, 6991f, 6991g, 6991h.

2. Part 280 is amended by adding subpart I consisting of §§ 280.200 through 280.240 to read as follows:

Subpart I--Lender Liability

Sec.

Subpart I--Lender Liability

§ 280.200 -- Definitions.

(a) *UST technical standards,* as used in this subpart, refers to the UST preventative and operating requirements under 40 CFR part 280, subparts B, C, D, G, and § 280.50 of subpart E.

(b) *Petroleum production, refining, and marketing.*

(1) *Petroleum production* means the production of crude oil or other forms of petroleum (as defined in § 280.12) as well as the production of petroleum products from purchased materials.

(2) *Petroleum refining* means the cracking, distillation, separation, conversion, upgrading, and finishing of refined petroleum or petroleum products.

(3) *Petroleum marketing* means the distribution, transfer, or sale of petroleum or petroleum products for wholesale or retail purposes.

(c) *Indicia of ownership* means evidence of a secured interest, evidence of an interest in a security interest, or

evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guarantees of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), and legal or equitable title obtained pursuant to foreclosure. Evidence of such interests also includes assignments, pledges, or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership.

(d) *A holder* is a person who, upon the effective date of this regulation or in the future, maintains indicia of ownership (as defined in § 280.200(c)) primarily to protect a security interest (as defined in § 280.200(f)(1)) in a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located. A holder includes the initial holder (such as a loan originator); any subsequent holder (such as a successor-in-interest or subsequent purchaser of the security interest on the secondary market); a guarantor of an obligation, surety, or any other person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder.

(e) *A borrower, debtor, or obligor* is a person whose UST or UST system or facility or property on which the UST or UST system is located is encumbered by a security interest. These terms may be used interchangeably.

(f) *Primarily to protect a security interest* means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation.

(1) *Security interest* means an interest in a petroleum UST or UST system or in the facility or property on which a petroleum UST or UST system is located, created or established for the purpose of securing a loan or other obligation. Security interests include but are not limited to mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, and consignments, if the transaction creates or establishes an interest in an UST or UST system or in the facility or property on which the UST or UST system is located, for the purpose of securing a loan or other obligation.

(2) *Primarily to protect a security interest,* as used in this subpart, does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any ownership indicia are held must be as protection for a security interest.

(g) *Operation* means, for purposes of this subpart, the use, storage, filling, or dispensing of petroleum contained in an UST or UST system.

§ 280.210 -- Participation in management.

The term "participating in the management of an UST or UST system" means that, subsequent to the effective date of this subpart, December 6, 1995, the holder is engaging in decisionmaking control of, or activities related to, operation of the UST or UST system, as defined herein.

(a) Actions that are participation in management.

(1) Participation in the management of an UST or UST system means, for purposes of this subpart, actual participation by the holder in the management or control of decisionmaking related to the operation of an UST or UST system. Participation in management does not include the mere capacity or ability to influence or the unexercised right to control UST or UST system operations. A holder is participating in the management of the UST or UST system only if the holder either:

(i) Exercises decisionmaking control over the operational (as opposed to financial or administrative) aspects of the UST or UST system, such that the holder has undertaken responsibility for all or substantially all of the management of the UST or UST system; or

(ii) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with respect to all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise.

(2) Operational aspects of the enterprise relate to the use, storage, filling, or dispensing of petroleum contained in an UST or UST system, and include functions such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer. Financial or administrative aspects include functions such as that of a credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise, [*46712] or actions associated with environmental compliance, or actions undertaken voluntarily to protect the environment in accordance with applicable requirements in 40 CFR part 280 or applicable state requirements in those states that have been delegated authority by EPA to administer the UST program pursuant to 42 USC 6991c and 40 CFR part 281.

(b) Actions that are not participation in management pre-foreclosure.

(1) Actions at the inception of the loan or other transaction. No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of this subpart. A prospective holder who undertakes or requires an environmental investigation (which could include a site assessment, inspection, and/or audit) of the UST or UST system or facility or property on which the UST or UST system is located (in which indicia of ownership are to be held), or requires a prospective borrower to clean up contamination from the UST or UST system or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the management of the UST or UST system or facility or property on which the UST or UST system is located.

(2) Loan policing and work out. Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of this subpart. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and work out activities cover and include all such activities up to foreclosure, exclusive of any activities that constitute participation in management.

(i) Policing the security interest or loan.

(A) A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not together with other actions participate in the management of the UST or UST system as provided in § 280.210(a). Such policing actions include, but are not limited to, requiring the borrower to clean up contamination from the UST or UST system during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the UST or UST system or facility or property on which the UST or UST system is located (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations, or promises from the borrower).

(B) Policing activities also include undertaking by the holder of UST environmental compliance actions and voluntary environmental actions taken in compliance with 40 CFR part 280, provided that the holder does not otherwise participate in the management or daily operation of the UST or UST system as provided in § 280.210(a) and § 280.230. Such allowable actions include, but are not limited to, release detection and release reporting, release response and corrective action, temporary or permanent closure of an UST or UST system, UST upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in 40 CFR part 280 or applicable state requirements in those states that have been delegated authority by EPA to administer the UST program pursuant to 42 U.S.C. 6991c and 40 CFR part 281. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the UST or UST system.

(ii) Loan work out. A holder who engages in work out activities prior to foreclosure will remain within the exemption provided that the holder does not together with other actions participate in the management of the UST or UST system as provided in § 280.210(a). For purposes of this rule, "work out" refers to those actions by which a holder, at any time prior to foreclosure, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations, or promises from the borrower.

(c) Foreclosure on an UST or UST system or facility or property on which an UST or UST system is located, and participation in management activities post-foreclosure.

(1) Foreclosure. (i) Indicia of ownership that are held primarily to protect a security interest include legal or equitable title or deed to real or personal property acquired through or incident to foreclosure. For purposes of this subpart, the term "foreclosure" means that legal, marketable or equitable title or deed has been issued, approved, and recorded, and that the holder has obtained access to the UST, UST system, UST facility, and property on which the UST or UST system is located, provided that the holder acted diligently to acquire marketable title or deed and to gain access to the UST, UST system, UST facility, and property on which the UST or UST system is located. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, re-lease an UST or UST system or facility or property on which the UST or UST system is located, held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the UST or UST system or facility or property on which the UST or UST system is located, in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the UST or UST system or facility or property on which the UST or UST system is located, taking all facts and circumstances into consideration, and provided that the holder does not participate in management (as defined in § 280.210(a)) prior to or after foreclosure.

(ii) For purposes of establishing that a holder is seeking to sell, re-lease pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest in a reasonably expeditious [*46713] manner an UST or UST system or facility or property on which the UST or UST system is located, the holder may use whatever commercially reasonable means as are relevant or appropriate with respect to the UST or UST system or facility or property on which the UST or UST system is located, or may employ the means specified in § 280.210(c)(2). A holder that outbids, rejects, or fails to act upon a written *bona fide,* firm offer of fair consideration for the UST or UST system or facility or property on which the UST or UST system is located, as provided in § 280.210(c)(2), is not considered to hold indicia of ownership primarily to protect a security interest.

(2) Holding foreclosed property for disposition and liquidation. A holder, who does not participate in management prior to or after foreclosure, may sell, re-lease, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), an UST or UST system or facility or property on which the UST or UST system is located, liquidate, wind up operations, and take measures, prior to sale or other disposition, to preserve, protect, or prepare the secured UST or UST system or facility or property on which the UST or UST system is located. A holder may also arrange for an existing or new operator to continue or initiate operation of the UST or UST system. The holder may conduct these activities without voiding the security interest exemption, subject to the requirements of this subpart.

(i) A holder establishes that the ownership indicia maintained after foreclosure continue to be held primarily to protect a security interest by, within 12 months following foreclosure, listing the UST or UST system or the facility or property on which the UST or UST system is located, with a broker, dealer, or agent who deals with the type of property in question, or by advertising the UST or UST system or facility or property on which the UST or UST system is located, as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the UST or UST system or facility or property on which the UST or UST system is located, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the location of the UST or UST system or facility or property on which the UST or UST system is located. For purposes of this provision, the 12-month period begins to run from December 6, 1995 or from the date that the marketable title or deed has been issued, approved and recorded, and the holder has obtained access to the UST, UST system, UST facility and property on which the UST or UST system is located, whichever is later, provided that the holder acted diligently to acquire marketable title or deed and to obtain access to the UST, UST system, UST facility and property on which the UST or UST system is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the UST or UST system, the 12-month period begins to run from December 6, 1995 or from the date on which the holder first acquires either title to or possession of the secured UST or UST system, or facility or property on which the UST or UST system is located, whichever is later.

(ii) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the UST or UST system or the facility or property on which the UST or UST system is located, establishes by such outbidding, rejection, or failure to act, that the ownership indicia in the secured UST or UST system or facility or property on which the UST or UST system is located are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

(A) Fair consideration, in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the UST or UST system or facility or property on which the UST or UST system is located, is the value of the security interest as defined in this section. The value of the security interest includes all debt and costs incurred by the security interest holder, and is calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security interest) owed to the holder immediately preceding the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure, plus any unpaid interest, rent, or penalties (whether arising before or after foreclosure). The value of the security interest also includes all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure, retention, preserving, protecting, and preparing, prior to sale, the UST or UST system or facility or property on which the UST or UST system is located, re-lease, pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), of an UST or UST system or facility or property on which the UST or UST system is located, or other disposition. The value of the security interest also includes environmental investigation costs (which could include a site assessment, inspection, and/or audit of the UST or UST system or facility or property on which the UST or UST system is located), and corrective action costs incurred under §§ 280.51 through 280.67 or any other costs incurred as a result of reasonable efforts to comply with any other applicable federal, state or local law or regulation; less any amounts received by the holder in connection with any

partial disposition of the property and any amounts paid by the borrower (if not already applied to the borrower's obligations) subsequent to the acquisition of full title (or possession in the case of a lease financing transaction) pursuant to foreclosure. In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in this paragraph.

(B) Outbids, rejects, or fails to act upon an offer of fair consideration means that the holder outbids, rejects, or fails to act upon within 90 days of receipt, a written, *bona fide,* firm offer of fair consideration for the UST or UST system or facility or property on which the UST or UST system is located received at any time after six months following foreclosure, as defined in § 280.210(c). A "written, *bona fide,* firm offer" means a legally enforceable, commercially reasonable, cash offer solely for the foreclosed UST or UST system or facility or property on which the UST or UST system is located, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this provision, the six-month period begins to run from December 6, 1995 or from the date that marketable title or deed has been issued, approved and recorded to the holder, and the holder has obtained access to the UST, UST system, UST facility and property on which the UST or UST system is located, whichever is later, provided that the holder was acting diligently to acquire marketable title or [*46714] deed and to obtain access to the UST or UST system, UST facility and property on which the UST or UST system is located. If the holder fails to act diligently to acquire marketable title or deed or to gain access to the UST or UST system, the six-month period begins to run from December 6, 1995 or from the date on which the holder first acquires either title to or possession of the secured UST or UST system, or facility or property on which the UST or UST system is located, whichever is later.

(3) Actions that are not participation in management post-foreclosure. A holder is not considered to be participating in the management of an UST or UST system or facility or property on which the UST or UST system is located when undertaking actions under 40 CFR part 280, provided that the holder does not otherwise participate in the management or daily operation of the UST or UST system as provided in § 280.210(a) and § 280.230. Such allowable actions include, but are not limited to, release detection and release reporting, release response and corrective action, temporary or permanent closure of an UST or UST system, UST upgrading or replacement, and maintenance of corrosion protection. A holder who undertakes these actions must do so in compliance with the applicable requirements in 40 CFR part 280 or applicable state requirements in those states that have been delegated authority by EPA to administer the UST program pursuant to 42 U.S.C. 6991c and 40 CFR part 281. A holder may directly oversee these environmental compliance actions and voluntary environmental actions, and directly hire contractors to perform the work, and is not by such action considered to be participating in the management of the UST or UST system.

§ 280.220 -- Ownership of an underground storage tank or underground storage tank system or facility or property on which an underground storage tank or underground storage tank system is located.

Ownership of an UST or UST system or facility or property on which an UST or UST system is located. A holder is not an "owner" of a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located for purposes of compliance with the UST technical standards as defined in § 280.200(a), the UST corrective action requirements under §§ 280.51 through 280.67, and the UST financial responsibility requirements under §§ 280.90 through 280.111, provided the person:

(a) Does not participate in the management of the UST or UST system as defined in § 280.210; and

(b) Does not engage in petroleum production, refining, and marketing as defined in § 280.200(b).

§ 280.230 -- Operating an underground storage tank or underground storage tank system.

(a) Operating an UST or UST system prior to foreclosure. A holder, prior to foreclosure, as defined in § 280.210(c), is not an "operator" of a petroleum UST or UST system for purposes of compliance with the UST technical standards as

defined in § 280.200(a), the UST corrective action requirements under §§ 280.51 through 280.67, and the UST financial responsibility requirements under §§ 280.90 through 280.111, provided that, after December 6, 1995, the holder is not in control of or does not have responsibility for the daily operation of the UST or UST system.

(b) Operating an UST or UST system after foreclosure. The following provisions apply to a holder who, through foreclosure, as defined in § 280.210(c), acquires a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located.

(1) A holder is not an "operator" of a petroleum UST or UST system for purposes of compliance with 40 CFR part 280 if there is an operator, other than the holder, who is in control of or has responsibility for the daily operation of the UST or UST system, and who can be held responsible for compliance with applicable requirements of 40 CFR part 280 or applicable state requirements in those states that have been delegated authority by EPA to administer the UST program pursuant to 42 U.S.C. 6991c and 40 CFR part 281.

(2) If another operator does not exist, as provided for under paragraph (b)(1) of this section, a holder is not an "operator" of the UST or UST system, for purposes of compliance with the UST technical standards as defined in § 280.200(a), the UST corrective action requirements under §§ 280.51 through 280.67, and the UST financial responsibility requirements under §§ 280.90 through 280.111, provided that the holder:

(i) Empties all of its known USTs and UST systems within 60 calendar days after foreclosure or within 60 calendar days after December 6, 1995, whichever is later, or another reasonable time period specified by the implementing agency, so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment; and

(ii) Empties those USTs and UST systems that are discovered after foreclosure within 60 calendar days after discovery or within 60 calendar days after December 6, 1995, whichever is later, or another reasonable time period specified by the implementing agency, so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remains in the system; leaves vent lines open and functioning; and caps and secures all other lines, pumps, manways, and ancillary equipment.

(3) If another operator does not exist, as provided for under paragraph (b)(1) of this section, in addition to satisfying the conditions under paragraph (b)(2) of this section, the holder must either:

(i) Permanently close the UST or UST system in accordance with §§ 280.71 through 280.74, except § 280.72(b); or

(ii) Temporarily close the UST or UST system in accordance with the following applicable provisions of § 280.70:

(A) Continue operation and maintenance of corrosion protection in accordance with § 280.31;

(B) Report suspected releases to the implementing agency; and

(C) Conduct a site assessment in accordance with § 280.72(a) if the UST system is temporarily closed for more than 12 months and the UST system does not meet either the performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21, except that the spill and overfill equipment requirements do not have to be met. The holder must report any suspected releases to the implementing agency. For purposes of this provision, the 12-month period begins to run from December 6, 1995 or from the date on which the UST system is emptied and secured under paragraph (b)(2) of this section, whichever is later.

(4) The UST system can remain in temporary closure until a subsequent purchaser has acquired marketable title to the UST or UST system or facility or property on which the UST or UST system is located. Once a subsequent purchaser acquires marketable title to the UST or UST system or facility or property on which the UST or UST system

is located, the purchaser must decide whether to operate or close the UST or UST system in accordance with applicable requirements in 40 CFR part 280 or applicable state requirements in [*46715] those states that have been delegated authority by EPA to administer the UST program pursuant to 42 U.S.C. 6991c and 40 CFR part 281.

PART 281--APPROVAL OF STATE UNDERGROUND STORAGE TANK PROGRAMS

1. The authority citation for part 281 is revised to read as follows:

Authority: 42 U.S.C. 6912, 6991 (c), (d), (e), (g).

Subpart C--[Amended]

2. Section 281.39 is added to subpart C to read as follows:

§ 281.39 -- Lender liability.

(a) A state program that contains a security interest exemption will be considered to be no less stringent than, and as broad in scope as, the federal program provided that the state's exemption:

(1) Mirrors the security interest exemption provided for in 40 CFR part 280, subpart I; or

(2) Achieves the same effect as provided by the following key criteria:

(i) A holder, meaning a person who maintains indicia of ownership primarily to protect a security interest in a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located, who does not participate in the management of the UST or UST system as defined under § 280.210 of this chapter, and who does not engage in petroleum production, refining, and marketing as defined under § 280.200(b) of this chapter is not:

(A) An "owner" of a petroleum UST or UST system or facility or property on which a petroleum UST or UST system is located for purposes of compliance with the requirements of 40 CFR part 280; or

(B) An "operator" of a petroleum UST or UST system for purposes of compliance with the requirements of 40 CFR part 280, provided the holder is not in control of or does not have responsibility for the daily operation of the UST or UST system.

(ii) [Reserved]

(b) [Reserved]

[FR Doc. 95-21982 Filed 9-6-95; 8:45 am]

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MEMORANDUM

DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF LAND PROTECTION AND REVITALIZATION
OFFICE OF SPILL RESPONSE AND REMEDIATION

Mail Address:
P.O. Box 1105
Richmond, VA 23218

Location:
629 East Main Street
Richmond, VA 23219

SUBJECT: **Guidance Document LPR-SRR-2014-02.**
Storage Tank Program Compliance Manual Volume 4: Compliance Process

TO: Elizabeth Lamp, Regional Petroleum Program Managers

FROM: Jeffery A. Steers
Director, Division of Land Protection and Revitalization

DATE: July 15, 2014

COPIES: Regional Directors

Summary:

This volume of the Storage Tank Program Compliance Manual provides guidance to DEQ staff on how to address issues concerning, and alleged violations of, UST regulations (9VAC25-580 *et seq.*), including: (1) notifying owners and operators of alleged violations; (2) performing compliance assistance and follow up, including when to refer a facility to enforcement; (3) resolving compliance issues; and (4) initiating and implementing delivery prohibition.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the public on DEQ's website at:
http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/PetroleumProgram/GuidanceRegulations.aspx.

Contact information:

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Disclaimer:

Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts.

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STORAGE TANK PROGRAM COMPLIANCE MANUAL

VOLUME IV-COMPLIANCE PROCESS

Table of Contents

1 Introduction

This volume provides guidance to DEQ staff on how to address issues concerning, and alleged violations of, UST regulations (9VAC25-580 *et seq.*), including: (1) notifying owners and operators of alleged violations; (2) performing compliance assistance and follow up, including when to refer a facility to enforcement; (3) resolving compliance issues; and (4) initiating and implementing delivery prohibition. [1]

DEQ staff use the full range of compliance procedures and select the most appropriate one(s) for each case. The procedures are generally listed in increasing order of severity. While staff usually begin with the least adversarial method appropriate to the case, selecting a procedure lies wholly in DEQ's discretion, within the law and regulations. DEQ encourages open discussion between the Regional Offices (ROs), Central Office (CO) Program Offices, and the CO Division of Enforcement (DE) to ensure compliance and enforcement goals are met.

DEQ staff use three types of written correspondence to notify owners/operators of potential noncompliance: Requests for Compliance Action (RCAs), Warning Letters and Notices of Violation (NOVs). These are typically issued by DEQ compliance staff in consultation with enforcement staff. NOVs mark the transition from compliance to enforcement. [2]

2 Compliance Timelines

Tank compliance staff will initiate the compliance process after conducting a UST inspection.

2.1 Day 1 to 89 –Request for Compliance Action (RCA) to Warning Letter.

[1] Guidance documents set forth presumptive operating procedures. They do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. *See* Va. Code § 2.2-4001.

[2] The DEQ Civil Enforcement Manual (Enforcement Manual) provides guidance on timelines for issuing compliance and enforcement documents. Within the Enforcement Manual it states that Program guidance may supplement the informal correction procedures described in the Enforcement Manual and modify the timelines described in those procedures.

Staff generally initiate compliance activities by sending an RCA (either a paper form or electronic version) to the owner/operator[3] preferably within 14 days after the inspection. The RCA is informal in tone and provides a basic, comprehensive description of the potential violations observed during the inspection, along with suggested corrective actions. All owners/operators of potentially noncompliant UST facilities should receive this RCA, regardless of the estimated time to return to compliance, unless an exception described in Section 3 applies. During this period, staff generally provide informal compliance assistance to encourage return to compliance.

The RCA should require the owner/operator to complete corrective actions within 90 days after the date of inspection. If the 90-day period for compliance has elapsed and the owner/operator has not achieved compliance, staff should issue a Warning Letter, unless an exception described in Section 3 applies.

2.2 Day 90 to 179 –Warning Letter to Notice of Violation (NOV).

By Day 90, if the owner/operator has not returned to compliance or signed a Tank Compliance Agreement (see next section), and a Warning Letter has not yet been issued, staff shall issue a Warning Letter requiring return to compliance. A Warning Letter is a compliance instrument that describes the factual observations made at the time of the inspection, recites the applicable law, and provides the process for obtaining a final decision on whether a violation exists.[4] Staff should copy Warning Letters to the UST operator, if applicable. Staff may continue to provide informal compliance assistance during this period to encourage return to compliance. Staff may also skip the Warning Letter and go directly to an NOV under certain circumstances discussed in Section 3.

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[3] In the UST program, tank owners are traditionally pursued first for compliance because owners are the more identifiable party due to DEQ's registration program. However, the Regulation holds both the owner and operator equally responsible for compliance; therefore, staff should be prepared to pursue the operator for compliance if circumstances warrant.

[4] Warning Letters are Notices of Alleged Violation and have requirements associated with them that are imposed by statute. (Va. Code §62.1-44.15(8a). Staff may find a more detailed discussion of the Warning Letter and its requirements in Chapter 2 of the Enforcement Manual. A UST Warning Letter template may also be found in Chapter 2A of the Enforcement Manual at:
http://www.deq.virginia.gov/Programs/Enforcement/Laws,Regulations,Guidance.aspx.

2.3 Tank Compliance Agreement

A Tank Compliance Agreement (TCA) is an informal compliance tool that represents an agreement between the owner/operator and DEQ to return the owner/operator to compliance. The TCA is a written agreement, signed by both the DEQ regional office and the owner/operator, setting out the required corrective action and deadlines to return to compliance. An owner/operator can enter into a TCA any time after an RCA is issued and before staff issue an NOV. The maximum amount of time allowed to return to compliance, including any approved extensions, is twelve (12) months from the date of the inspection. Regardless of where the TCA occurs in the process, if the owner/operator fails to meet the compliance deadlines set out in the TCA, staff should issue an NOV and refer the owner/operator to enforcement.

2.4 Day 180 –NOV.

By Day 180, DEQ compliance staff in consultation with regional enforcement staff, shall issue an NOV[5] if (1) the owner/operator has not returned to compliance or signed a TCA, and (2) an NOV has not yet been issued. Staff should copy NOVs to the operator, the landowner, and the State Corporation Commission (SCC) registered agent, if applicable. Once the NOV has been issued, the case should be referred to Regional Enforcement staff for resolution.

2.5 Return to Compliance

If the owner/operator completes and documents satisfactory return to compliance before the issuance of the NOV, staff should close the compliance case by resolving the action in CEDS following the appropriate database procedures. Staff should also send a return-to-compliance acknowledgement to the owner. (See **Appendix-M).**

[5] For a detailed description of the NOV and its requirements, please see Chapter 2 of the Enforcement Manual at http://www.deq.virginia.gov/Portals/0/DEQ/Enforcement/Guidance/Chapter2-Text.pdf. Standard language to insert in a UST Notice of Violation can be found in Chapter 2A of the Enforcement Manual at http://www.deq.virginia.gov/Portals/0/DEQ/Enforcement/Manual/Chapter2/attachments/Chapter2A-Attachments(2013-12-2).pdf.

3 Accelerated Compliance Follow-up Scenarios

3.1 Introduction

The preceding section outlines the typical compliance process timeline. Compliance staff should follow the compliance timelines set out in the preceding section; however, under certain circumstances, it is appropriate to move more quickly through the compliance process, which typically means going straight from the RCA to the NOV. Rapid elevation, including use of the Delivery Prohibition process (see section 5), may be appropriate based on: (1) the failure to meet a TCA deadline; (2) the status of outstanding enforcement issues at the same facility; (3) the owner's/operator's compliance history; (4) newly discovered issues at re-inspected facilities; or (5) the gravity of the violation.

3.2 Failure to Meet TCA Deadlines

As discussed in Section 2.3, staff should move directly to an NOV in cases where an owner/operator has failed to meet compliance deadlines in a TCA. Violations of consent orders, unilateral orders or letters of agreement typically will be addressed by enforcement staff.

3.3 Active NOV from Previous Inspection

If the current owner/operator has an active, unresolved NOV for the facility at the time of its inspection, and additional non-compliance is discovered (regardless of whether the potential violations are the same or similar), then the inspector should elevate the compliance response. An active, unresolved NOV is one that has been referred to enforcement and has been neither settled through an Order or Letter of Agreement nor de-referred. Under these circumstances, another NOV should be issued to the owner/operator, along with a copy of the inspection report. Compliance staff should coordinate with the enforcement staff handling the outstanding action to determine who should send the NOV.

3.4 Compliance History

Staff should accelerate the compliance response when an owner/operator received an NOV at the same facility during the last inspection cycle, regardless of whether the potential violations are the same as the ones identified through previous inspections. In these cases, staff should issue an RCA and give the owner/operator an opportunity to resolve the

potential noncompliance. However, if the owner/operator does not return to compliance within the timeframe prescribed by the RCA, staff should issue an NOV and refer the case to enforcement.

3.5 Violations Discovered During Site Visit or Re-Inspection

During the course of enforcement after an NOV has been issued, enforcement staff will occasionally request that compliance staff visit or re-inspect a facility that is subject to a current enforcement action. If the inspector identifies any new compliance issues during this re-inspection or site visit, compliance staff should coordinate with the enforcement staff handling the outstanding action to determine who should send the NOV and refer the matter to the appropriate enforcement staff for follow up activities.[6]

3.6 Potential for Harm

By Regulation[7], DEQ addresses certain alleged violations differently due to the potential harm they pose to the environment. Tank systems that are not equipped with basic pollution prevention equipment represent a substantial threat of environmental impact. Because of this, these "failure to install" issues[8] are addressed through the expedited delivery prohibition process discussed in Section 5.4.

4 Addressing Non Compliance With Parties Other Than the Registered Owner

4.1 Registered Owner

State Water Control Law[9] and its accompanying regulations[10] hold both the UST owner and the operator responsible for compliance with pollution prevention requirements. As a

[6] Issuing an NOV at the onset allows resolution of the newly discovered issues to move forward at the same pace as the outstanding enforcement action. This is particularly critical if enforcement staff are contemplating delivery prohibition because, for most potential violations, DEQ must first issue a warning letter or NOV and give the owner an opportunity to comply before initiating delivery prohibition. Once the NOV is issued and an opportunity to comply provided, enforcement staff can include the newly discovered issues in the delivery prohibition proceeding along with the outstanding ones.

[7] 9VAC25-580-370.

[8] See Appendix C for the types of potential violations that must be addressed through expedited delivery prohibition and Section 5 for a discussion of the process.

[9] Va. Code §62.1-44.34:8 *et seq.*

program practice, DEQ has pursued the entity that has registered the tanks with DEQ (registered owner) first. Generally speaking, pursuing compliance with one entity rather than multiple ones results in a quicker return to compliance. The registered owner is the logical choice because this entity has identified itself through the registration process as the UST owner and a responsible party for compliance.

The registered owner is not the only option for achieving compliance, however. In some situations, the registered owner may no longer be a viable responsible party for purposes of returning the facility to compliance. In the following circumstances, the registered owner may not be considered a viable responsible party for compliance if:

- The registered owner is deceased;
- The registered owner has filed a liquidating bankruptcy action;
- The registered owner is no longer an active legal entity;
- The registered owner cannot be located;
- The registered owner has permanently left the state or country evidencing an intent to abandon its compliance responsibilities; or
- The registered owner is an out-of-state corporation that is no longer doing business in Virginia.

If, through the compliance process, the registered owner proves to be unresponsive and staff discover that one of these factual circumstances applies, staff should look to other potential parties for compliance.

4.1.1 Registered Owner is no longer an active legal entity

Although the criteria above are generally self-explanatory, the circumstance where the registered owner entity is no longer in existence as a legal entity (defunct) requires additional discussion. Staff often learn through the compliance process that the registered owner is no longer deemed an "active" entity by the State Corporation Commission ("SCC"). [11] Generally, a

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[10] 9VAC25-580.

[11] See https://cisiweb.scc.virginia.gov/z_container.aspx With this link, staff can access the State Corporation Commission's Clerk's Information System database to identify an entity's status, officers, registered agent, address and other information. Click on the bottom link ("Name Search all Entities"), then type some or all of the entity's name in the blank provided and click Enter. Scroll through the list of names provided (hit F8 to access the next page on the list, F7 for the previous page, and F2 to return to the search entry page), select the correct entity, and double click. Select desired option from list provided. The website can be difficult to use. For example, if the company name is a person's name, such as Michael W. Jones Builders, Inc., then you must search for Jones Builders, Inc., Michael W. However, this rule doesn't apply in every case, so when in doubt, staff can obtain definitive information by contacting the Clerk's Office Call Center at (804) 371-9733 or toll-free (in Virginia only) 1-866-SCC-CLK1 (1-866-722-2551).

corporation or LLC[12] that is listed as "terminated", "cancelled" ,"dissolved", or "purged" in the SCC database is defunct and cannot be pursued for compliance.

In some cases, however, the entity's operating authority has been terminated automatically by the SCC due to its failure to pay annual filing fees. The database will indicate if the termination was an automatic one due to nonpayment of fees. In this event, staff should continue to pursue the entity and note in the correspondence that the SCC database indicates that the business has been terminated for non-payment of fees. Often the business, upon learning this information, will make the payment and become reinstated as an active entity. When in doubt about whether an entity is defunct, staff should contact the Office of Spill Response and Remediation (OSRR). In situations where the entity is no longer a valid legal entity (other than the situation described in this paragraph) staff should pursue other options for compliance.

4.2 Operator

If the UST facility is operating and the registered owner no longer exists or is not a viable party to pursue, staff should pursue the operator for compliance. State Water Control Law defines an operator as "any person in control of, or having responsibility for, the daily operation of the underground storage tank."[13] An operator is the person or entity having ultimate authority or the right to exercise control over the UST's day-to-day operations. An operator of a UST is a person or entity who has the responsibility for performing any of the requirements of the UST Technical Regulation. For example, an operator is a person or entity who is responsible for inspecting regulated substance deliveries; monitoring any regulated component of the UST system; or controlling surface spills of petroleum from a UST facility. Station or facility managers who are employees of the person or entity with superior authority over the UST's operations are not operators. In this case, the person with the superior authority over the USTs would be the operator. Staff can also refer to the Class A and Class B operator designations on file with the facility to assist in identifying the tank operator.

A person may be both the operator and the owner of a UST. In addition, operators include, but are not limited to, persons or entities that operate USTs (a) leased or franchised from the UST owner, or (b) used by the operator as part of an exclusive supply contract.

Petroleum suppliers who provide product to a person or entity on a consignment basis may be considered operators. A consignment arrangement is defined as follows: (a) the person

[12] If the business is neither a partnership, corporation nor limited liability company (LLC) then it is considered a sole proprietorship and the individual who owned the business is the person who is responsible for compliance.
[13] Va. Code §62.1-44.34:8

or entity receiving the product does not purchase/own the product but does, however, receive a predetermined percentage of actual sales, and (b) the petroleum supplier has the responsibility for maintaining and gauging tanks, and performing UST regulatory requirements. A person or entity, which receives a product on a consignment basis and has no responsibility for performing any of the requirements of the UST Regulation, may not be an operator of a UST.

Staff should consult with OSRR for assistance with identifying an operator to pursue.

4.3 Landowners as Tank Owners

In the past, DEQ generally considered the landowner to be the UST owner only in those cases where (1) the registered UST owner and the landowner are the same; or (2) the UST is not registered with DEQ. DEQ took this approach because the UST owner could be a different entity than the landowner and the UST registration form was considered sufficient to identify the UST owner when the UST owner and landowner differed. DEQ considered the registration form a reflection of the parties' intent to separate the UST from the land such that it became the personal property of the entity registering the UST rather than a fixture that existed as part of the land, like a wall or a fence.

From a property law standpoint, however, courts generally consider USTs to be fixtures[14] rather than personal property. The analysis used by courts to identify whether an item is a fixture emphasizes the UST owner's intent to make the item a permanent addition to the real property. Although DEQ has considered the UST registration form dispositive on the issue of intent in the past, case law, as well as other states' practice, support treating the UST as a fixture in these situations where a breakdown in the relationship between the landowner and the UST owner has occurred. Consequently, a landowner may be considered the tank owner in those situations where the tank is a fixture to the land. Therefore, where (1) the registered owner meets the conditions described in Section 4.1 above; (2) no operator exists and (3) the available evidence indicates that the UST is a fixture, staff may pursue the landowner for compliance. Contact OSRR for help in analyzing whether a UST is a fixture in a particular case.

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[14] Generally, courts apply a three-part test when analyzing whether a tank becomes a fixture of the real property. The test looks at:

1. The nature of the tank's annexation to the realty and the annexation's degree of permanency,
2. The tank's adaptation to the property's use or purpose, and
3. The UST owner's intention to make it a permanent addition to the real property.

Danville holding Corp. v. Clement, 178 Va. 223, 232, 15 S.E.2d 245, 250 (1941).

4.4 Lenders

Generally, banks or other financial institutions that hold mortgages on the UST facility property and foreclose on the facility property are not considered UST owners or operators under law.[15] State Water Control Law provides an exemption from compliance and cleanup liability to persons or entities that have a security interest in real property on which regulated USTs are located ("lenders"). This exemption allows lenders to foreclose on property with USTs and perform certain compliance activities (e.g., removing the UST, pumping the product out of the UST, reporting a release) without incurring liability as the UST owner.

Lenders may perform site assessments at UST facilities as a part of foreclosure or prior to foreclosure to assess whether the property is contaminated. If the property is contaminated, lenders often apply to DEQ for exemption from cleanup liability. Lenders that are granted the exemption are required to empty the tanks of product within 60 days of foreclosure and place the USTs in temporary or permanent closure. Therefore, although lenders that qualify for the exemption are not required to bring the tanks into compliance with pollution prevention requirements[16], the exemption process reduces the risk posed by noncompliant tanks by forcing product removal and temporary or permanent closure.

NOTE: A lender must submit a Notification for Underground Storage Tanks (USTs) Form 7530-2 to document closure as part of the temporary and permanent closure requirements; however, they are not required to sign the form as an owner. Lenders can submit an unsigned form to comply with the closure notification requirements.

Staff should direct any interested lenders to DEQ's Lender Liability Exemption Guidelines and refer them to OSRR for additional guidance.

4.5 Compliance Process

This section discusses the process for addressing noncompliance at a UST facility without a viable registered owner or operator.

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[15] Va. Code §62.1-44.34:8.

[16] Lenders may become responsible for compliance if they operate the USTs after the foreclosure. Operator liability is not covered by the exemption.

4.5.1 Initiating the Compliance Process

Staff should begin the compliance process, as usual, by sending an RCA to the registered owner. If the registered owner is nonresponsive and falls into one of the categories listed in Section 4.1 and no UST facility operator exists, then staff should identify the landowner.

4.5.2 Identifying the Landowner

Generally, staff can access a locality's real property records to identify a landowner. Most localities offer this information through an online database, usually through the Tax or Real Estate Assessor's office or the Commissioner of Revenue's office.[17] If the information is not available online, staff can still obtain it by calling the appropriate locality office directly. The website should also provide a billing or mailing address for the landowner. OSRR staff are available to assist regional staff with identifying land owners.

4.5.3 Contacting the landowner

Once the landowner is identified, staff should send a copy of the RCA along with a letter notifying the landowner that noncompliant tanks are located on his or her property and requesting information concerning the status of the tanks. (see **Appendix-A**) for a sample letter.) The letter should also explain tank compliance requirements and ownership consequences, and will allow the landowner the opportunity to refute ownership. If the landowner indicates a willingness to return the tanks to compliance, then staff should work with the landowner to achieve compliance. If the landowner refutes ownership and provides documentation, staff should consult with OSRR to determine whether to proceed. If the landowner is not cooperative but the UST appears to be a fixture, then staff may pursue the landowner as in 4.5.5 below. OSRR will evaluate any documentation provided as described below.

4.5.4 Evaluating a landowner for tank ownership

Evaluating whether a landowner should be considered the tank owner is a fact dependent process. Relevant documents are any documents that may aid in analyzing UST ownership, such as deeds, bills of sale, lease agreements, or contracts involving use or

[17] Usually, staff can find the appropriate website by typing the locality's name and the words "property search" into the internet search engine, e.g., "Campbell County Virginia property search".

ownership of the USTs from the landowner or registered owner[18]. For example, lease agreements may contain clauses that deal with the disposition of personal property upon termination of the lease or abandonment. Similarly, contracts may have termination clauses that specify UST ownership. The landowner may provide sale documents that demonstrate that the tanks were specifically excluded from the sale of the property (e.g., VDOT frequently includes such clauses when acquiring property for transportation purposes.) Staff should provide the documents to OSRR staff who will perform an ownership analysis and notify regional staff of the result.

The absence of written documentation should not prevent pursuit of the land owner for compliance, however. For example, staff may also consider whether the landowner has taken actions regarding the UST(s) that indicate an ownership interest, such as marketing the property as a gas station. The Department of Agriculture and Consumer Services' Weights & Measures listing of UST facility site data may be another ownership data source. Whenever the situation arises where the registered owner is not viable and there is no facility operator, staff should consult with OSRR because the circumstances may warrant pursuit of the landowner for compliance.

4.5.5 Pursuing a Landowner for compliance

If the landowner does not refute ownership or respond by the deadline set in the letter, staff should issue a Warning Letter to the landowner. If the landowner is unresponsive or refuses to comply with the Warning Letter, staff should assess the risk posed by the noncompliant tanks before continuing with the compliance process.

4.5.6 Assessing Risk & Referring the Landowner to Enforcement

After the Warning Letter deadline has passed, staff must decide whether to pursue the landowner further for compliance. Staff should evaluate whether the facility has been identified as "low risk" or "high risk" based on the criteria found in DEQ's Risk Based Inspection Strategy (RBIS) for Underground Storage Tanks (USTs) guidance[19]. If the facility meets the RBIS criteria for "high risk", then staff should issue an NOV and refer the case to enforcement.

Staff should copy the local fire official's office on the NOV to notify local fire personnel of the existence of noncompliant petroleum storage tanks on the property.

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[18] In the case of a defunct corporation or limited liability company, officers of the entity may still be available to provide the documents.

[19] http://www.deq.virginia.gov/Portals/0/DEQ/Land/Tanks/LPR-SRR-01-2012.pdf.

4.5.7 Closing the Compliance Case without Referral to Enforcement

In cases where there is (1) no viable party to pursue for compliance or (2) the facility is identified as "low risk" according to the RBIS criteria, staff should administratively close the compliance case without further action. An administrative closure occurs when staff close the compliance case without resolution of all the potential noncompliance. Staff should document the compliance file with a compliance case administrative closure memo that outlines the reasons for administrative case closure, including which of the above-listed closure criteria were met and the basis for determining that the criteria were met. For example, if the reason for case closure was the inability to locate a viable party to pursue, staff should state that in the memo and describe the steps taken to determine the lack of a viable registered owner, operator and landowner. Staff should also send a letter to the landowner (in those cases where the landowner has been located) notifying the landowner of the potential consequences of leaving noncompliant USTs on the property. (see **Appendix-B**.) Finally, staff should note the administrative closure in CEDS.

4.5.8 Subsequent Inspections

Although staff may have closed the compliance case before the facility returned to compliance, staff should continue to inspect the facility in the standard three-year cycle to assess whether any changes have occurred that would suggest renewing the compliance action. For example, staff should check to see if the registered owner has resurfaced, the UST facility is back in operation or the property has changed hands. If the situation remains unchanged, no compliance follow-up is necessary. Staff should document the file to that effect with a memo.

5 Delivery Prohibition

This section provides guidance to regional petroleum tank compliance and enforcement staff on the process for imposing fuel delivery prohibition (issuing a "red tag") on noncompliant USTs. This section differentiates between expedited implementation of the delivery prohibition process and implementation of delivery prohibition through the traditional compliance and enforcement process.

5.1 Background

The Federal Energy Policy Act of 2005 (EPACT) makes it unlawful for anyone to deliver a regulated substance into or accept delivery of a regulated substance into certain noncompliant USTs. EPACT also requires states to promulgate regulations to develop processes and

procedures to implement the delivery prohibition requirement. In 2008, EPA developed guidance to the states on how to implement the delivery prohibition process. Part IX of the Virginia UST Technical Regulation (9VAC25-580-370) was promulgated to comply with the requirements imposed by EPACT, as well as EPA guidance, and provides criteria to identify USTs subject to delivery prohibition. The Regulation also describes, in general, the process to "tag" a UST that is subject to delivery prohibition. This section provides DEQ regional staff with additional detail on how to identify a UST subject to delivery prohibition and the procedures for moving through the delivery prohibition process.

5.2 Delivery Prohibition Regulatory Requirements

The Regulation, as adopted, identifies two broad classes of violations and differentiates between the response appropriate for each of the two classes. The first class of violations encompasses instances where a tank is not installed with the necessary pollution prevention equipment. These types of violations are referred to as "not equipped to comply" violations and warrant implementation of an expedited delivery prohibition process. In this expedited process, staff identify a violation and move directly into the delivery prohibition process. The second class of violations, with a couple of exceptions, falls into the category of operation and maintenance. These violations are first addressed using traditional compliance and enforcement mechanisms before staff begin the delivery prohibition process. **Appendix-C** provides the general matrix staff should use to differentiate between violations that warrant the expedited delivery prohibition process and violations that warrant the regular track.

5.3 Expedited vs. Regular Process

The following discussion describes an "expedited" process track and a "regular" process track for implementing delivery prohibition. There are two major differences between the two tracks. The first difference is that staff **must** initiate delivery prohibition if they discover a potential expedited violation. For regular track violations, the regional office has the option to pursue delivery prohibition as part of the enforcement process.

The second difference lies in how quickly staff initiate delivery prohibition. On the expedited track, staff initiate delivery prohibition immediately after the inspection or receipt of information indicating a potential violation exists. On the regular track, staff first use traditional compliance and enforcement mechanisms to resolve the alleged violations before moving to delivery prohibition. The track taken is dependent upon the type of potential violations discovered during the inspection. Once delivery prohibition proceedings have begun, the steps in the process are essentially the same for both tracks.

Inspectors should be familiar with the potential violations that will initiate the expedited delivery prohibition process. (see **Appendix-C** for potential violations warranting expedited delivery prohibition.)

5.4 Expedited Process

5.4.1 Inspection

During an inspection, if staff identifies a potential violation warranting expedited delivery prohibition (see **Appendix-C**), the inspector must provide an RCA that specifies the potential delivery prohibition violation(s) and contains language explaining the delivery prohibition process. This RCA will be provided after the inspection via first class mail with delivery confirmation and email to the owner/operator.

5.4.2 Post-Inspection

The inspector and regional office Petroleum Programs Manager should review the inspection report and decide whether the alleged violations merit expedited delivery prohibition. If they decide that there is a potential violation that falls into the expedited category, staff **must** mail a Notice of Delivery Prohibition Proceedings (Notice) to the owner and operator, if they are different entities, identifying the potential violation(s) (see **Appendix-D**). The Notice should be mailed using delivery confirmation or delivery receipt within 3 to 10 business days of the inspection and should include a copy of the inspection report. Sometimes, staff may need to gather additional information after the inspection to determine if a potential violation exists before proceeding with the Notice. In these situations, staff are not required to send the Notice within 10 business days but should move promptly to gather the information necessary to develop the case. In any event, staff should send the Notice as soon as possible after identifying that potential expedited violations exist. Staff may also hand deliver the Notice to the employee in charge at the facility in lieu of mailing it. If the owner/operator is a corporation or limited liability company and there is any question about the reliability of the address used to mail the Notice, staff must mail a copy of the Notice using delivery confirmation or delivery receipt to the owner/operator's registered agent.[20] If ownership is

[20] See https://cisiweb.scc.virginia.gov/z_container.aspx . With this link, staff can access the State Corporation Commission's Clerk's Information System database to identify an entity's status, address and registered agent. Click on the bottom link ("Name Search all Entities"), then type some or all of the entity's name in the blank provided and click Enter. Scroll through the list of names provided (hit F8 to access the next page on the list, F7 for the previous page, and F2 to return to the search entry page), select the correct entity, and double click. Select desired option from list provided. The website is archaic and often difficult to use, for example, if the company name is a person's name, such as Michael W. Jones Builders, Inc., then you must search for Jones Builders, Inc.,

disputed, staff must mail a copy of the Notice using delivery confirmation or delivery receipt to all potential owners. Staff may choose to notify the landowner as well. Staff may also fax or email the Notice to the owner and operator in addition to mailing the Notice.

NOTE: Although the regulation allows staff to give notice of the impending delivery prohibition process by leaving a copy of the Notice with the employee in charge at the facility, staff must make every effort to mail the Notice to the owner and the operator (and/or the registered agent) if there is a reliable contact name and address in the file.

The Notice should only contain alleged expedited violations. All other alleged violations should be pursued through the regular compliance/enforcement process. This is referred to as the "dual track" or "parallel track" process.

5.4.3 Central Office Coordination

Central office will collaborate with the regional office regarding use of delivery prohibition for expedited cases. Regional office staff **must** provide a draft copy of the Notice to the OSRR Legal Coordinator and the Central Office Tank Enforcement Manager in the Division of Enforcement (DE) for review and consultation prior to mailing the Notice to the owner and operator.[21] OSRR will communicate any concerns to regional staff promptly. Regional office staff may contact OSRR or DE at any time before drafting the Notice to discuss the suitability of a candidate.

5.4.4 Notice of Delivery Prohibition Proceedings

The Notice will inform the owner and operator that DEQ intends to hold an Informal Fact Finding Proceeding (IFF) to determine whether the issues identified during the inspection are violations of the regulation that warrant delivery prohibition. Staff must use the boilerplate Notice in **Appendix-D** to notify the owner and operator of DEQ's intent to begin delivery prohibition proceedings. The Notice is designed to provide the owner and operator with all the information required by the Administrative Process Act (§§2.2-4000 *et seq.*) and any changes to the Notice must be approved beforehand by OSRR and DE.

Staff should contact the owner and operator before sending the Notice to notify them that the IFF is forthcoming and offer a choice of meeting dates. The date should be between 21

Michael W. However, this rule doesn't apply in every case, so when in doubt, staff can obtain definitive information by contacting the Clerk's Office Call Center at (804) 371-9733 or toll-free (in Virginia only) 1-866-SCC-CLK1 (1-866-722-2551).

[21] Regional office staff should develop a Notice distribution list within their region to ensure that any staff who may be involved in the delivery prohibition process are copied.

and 60 calendar days from the date of the inspection. The date for the IFF should be chosen before the Notice is sent and prominently displayed in the Notice.

5.4.5 Waiver

The Notice contains language informing the owner/operator of the option to waive the informal fact finding proceeding. A waiver form should be included with each Notice sent (see **Appendix-E**). If both the owner and operator (if existing) sign and return the waiver, staff may cancel the informal fact finding proceeding and move directly to a decision. In this case, the regional Petroleum Programs Manager should review the Notice and supporting documents and decide whether delivery prohibition should be imposed. Regional staff may then attach the red tags to the noncompliant tanks.

5.4.6 Return to Compliance Prior to IFF

The Notice will clearly state that the owner/operator may correct the alleged violations prior to the IFF. The Notice will provide that the owner/operator must submit any documentation at least 3 business days prior to the meeting if he/she intends to demonstrate compliance before the IFF. If the owner/operator submits documentation to demonstrate compliance by the deadline, staff should review the documents promptly and, if the documentation sufficiently demonstrates that the alleged violations are corrected, staff should cancel the IFF and notify the owner/operator of the cancellation in writing (see **Appendix-F**). If the documentation does not demonstrate compliance then staff should promptly communicate in writing any deficiencies to the owner/operator (see **Appendix-G**). (These communications can be sent via mail, fax or email.)

5.4.7 Delivery Prohibition IFF:

Delivery prohibition IFFs should be held in the regional office, although extenuating circumstances may warrant holding the IFF in central office. Regional office staff should contact the owner/operator to schedule the IFF date. If the owner/operator cannot make the chosen date, staff can offer one alternative date. If the owner and/or operator does not show up on the day of the meeting, the meeting will be held in their absence.

OSRR will designate a presiding officer for each scheduled delivery prohibition IFF.[22] The presiding officer will handle logistical communications with the owners/operators once the Notice has been sent and will make decisions regarding rescheduling. Regional office staff may

[22] Central office will maintain a pool of volunteers to act as backup for these individuals.

continue to discuss compliance issues with the owner/operator. The presiding officer, in conjunction with central office, will be responsible for maintaining the red tags for the regions and providing them to regional staff at the IFF, if necessary.

The proceeding should be informal in tone. Regional program staff will advocate at the meeting on behalf of DEQ. At the region's discretion, the job of advocate can be handled by the inspector, an enforcement specialist or manager, or the Petroleum Programs Manager. An Advocate Checklist is available for regional staff to use to prepare for the proceeding (see **Appendix-H**). The proceedings should be recorded via audio recorder.

In most cases, the presiding officer's goal will be to issue the decision orally and in writing during the meeting. To facilitate this goal, a boilerplate decision document has been created for use in each individual delivery prohibition decision (see **Appendix-I**). If a decision is not rendered at the meeting, the presiding officer will follow up with a written decision using delivery confirmation or delivery receipt to the parties within a reasonable time.

If neither the owner nor operator is present at the IFF or if one of them is not present, then the presiding officer should mail the decision to the absent party(s). Facsimile or email transmission with receipt confirmation can be used in lieu of mail. If the presiding officer finds that no violation exists, he or she will state that in the decision and state that the delivery prohibition process is concluded.

If the presiding officer makes a decision to impose delivery prohibition, the presiding officer must immediately notify the OSRR Legal Coordinator, who will notify the webmaster to update the DEQ webpage. Copies of this decision must also be provided to the OSRR Director, the OSRR Legal Coordinator and the OSRR Training Coordinator. The OSRR Training Coordinator will use this information to update the delivery prohibition email notification list.

In situations where the delivery prohibition IFF is combined with an 1186 proceeding, DE staff will advocate at the proceeding. These proceedings are generally more formal in tone, and the presiding officer will not issue an immediate decision but will instead recommend a course of action to the Director. The final order will be signed by the Director. After an order is issued, the remaining procedures in Section 5 will apply.

5.4.8 Attaching the Delivery Prohibition Tag

If the owner or operator is present at the IFF and the presiding officer determines that a delivery prohibition violation exists, the regional office inspector or other staff should return to

the facility no later than 5 business days from the date of the decision and attach a delivery prohibition (red) tag to the fill pipe for each designated tank. If none of the potential responsible parties are present for the IFF, staff should wait 3 business days from the date the decision is mailed to the responsible parties before tagging, unless the parties have confirmed receipt before the 3 days have elapsed. Regional staff may tag immediately if any of the potential responsible parties are present at the IFF. The inspector should make an attempt to notify the owner/operator by telephone or email of the anticipated date that the tag will be applied. Staff should also contact OSRR's Legal Coordinator with the proposed tag date.

Before attempting to affix the tag, the inspector may take any precautions necessary to protect his or her safety, which may include requesting a police escort or other protection, or leaving the site at any time if conditions appear hostile.

When the tag is attached to the fill pipe, staff must match the tag number to the designated tank as specified during the IFF and in the delivery prohibition decision. The inspector must photograph the UST(s) fill pipe before and after the tag is in place. The inspector may also check the volume of fuel in the UST(s) and take a dispenser totalizer reading.

Regional staff should make every effort to attach the delivery prohibition tag to the tank's fill pipe and must use DEQ issued zip ties.[23] If the spill bucket around the fill pipe is full of water or product and the tag cannot be applied, then the inspector should request that the owner/operator empty the spill bucket in accordance with proper disposal requirements. If the owner/operator refuses to empty the spill bucket, the inspector should, at a minimum, attach the tag to the manhole cover, or other available location. Regional staff must photograph the full spill bucket and the tag, and document the owner/operator's refusal before leaving the facility. Regional staff should document all observations, actions and conversations while at the site in a memo to the file. As soon as possible after the tag(s) have been attached, staff should notify OSRR's Legal Coordinator with the date the tag was attached and any issues that arose during the tagging process.

The presence of the tag on the fill pipe of a UST shall be sufficient to notify any person that the UST is ineligible for delivery or deposit.

[23] In general, the zip tie should be placed around the fill pipe. In some cases the diameter of the fill pipe may require staff to use two zip ties to ensure that the tag is secure. If the zip tie cannot be placed around the fill pipe, then it can be placed through the fill cap. Note that if the tie is placed through the cap, then the tank likely cannot be filled for testing without breaking the zip tie.

5.4.9 Delivery Company Notification

Central office staff will maintain a website identifying the Virginia facilities with active red tags along with an email list of delivery companies interested in receiving notifications of delivery prohibition. The OSRR Training Coordinator will send an email to the list members each time a new facility has been added to the active delivery prohibition list. The list will provide the name and location of the facility where the tag(s) has been applied. In addition, if central office or regional staff knows the identity of the delivery company for that facility, they may notify the delivery company directly as a courtesy.

5.4.10 Future Deliveries Prohibited

If staff discovers or suspects that a delivery has been made to a tagged tank, or that a tag has been altered, defaced or removed then staff should notify the Regional Petroleum Programs Manager and central office immediately.

5.4.11 Temporary Removal of the Tag

If an owner/operator wishes to conduct repairs, upgrades, testing or remove or add product that requires the temporary removal of a red tag, the owner/operator must provide a written request (email is sufficient) explaining the testing parameters, the tank systems affected and the amount and type of fuel involved. The request should also include the proposed time and date for the event. Upon written approval by DEQ regional staff in consultation with OSRR, the tag may be temporarily removed to conduct repairs, upgrades, testing or to add or remove product (email approval is sufficient). If approval involves accepting product into the tank to conduct testing, the approval letter must set out the conditions under which the delivery can be made, including the amount of regulated substance that can be delivered into the tank system, the timing of the test and whether the fuel must be removed from the tank after the test.

Staff should only grant permission to receive fuel in circumstances where test results require fuel and other reasonable options are not available. Regional staff may choose to be on site to remove the tag, if necessary, or may authorize the owner/operator or fuel delivery company in the approval correspondence to remove and replace the tag, if necessary, for the limited testing period. If regional staff allow the owner/operator to remove and replace the tag, then staff must supply DEQ approved zip ties along with the approval correspondence. In any event, regional staff must ensure that the tag is reattached after the event is concluded.

5.4.12 Return to Compliance Post IFF:

Regional program staff should review any document submittals from the owner/operator supporting a return to compliance and contact the owner/operator within 5 business days of receipt to communicate whether the documentation is sufficient to confirm a return to compliance. If the documentation is insufficient, staff should outline the deficiencies in writing (email or fax is sufficient) and request the necessary documents to verify return to compliance (see **Appendix-J**). If the documentation is sufficient to verify a return to compliance for any of the USTs at the facility, then the delivery prohibition tag must be removed for those specific USTs that have returned to compliance.

Staff should direct the letter to the party who submitted the documents but should copy all other parties as well. For example, if the owner sent in the documents, staff should address the letter to the owner and copy the operator.

5.4.13 Return to Compliance for Red Tagged Facilities

In assessing return to compliance, program staff should, at a minimum, require the owner of a tagged facility to take the same actions that would be required to return a non-tagged tank to compliance. Return to compliance decisions are fact dependent and may require additional consultation with regional and OSRR staff. OSRR is available to discuss these situations and review previous red tag cases to help the region evaluate whether an owner/operator has provided sufficient documentation to return to compliance.

5.4.14 Delivery Prohibition Tag Removal

Upon concluding that the owner/operator has returned one or all tagged USTs at the facility to compliance, regional staff must return to the facility **within 2 business days** to remove the delivery prohibition tag from the compliant tank(s). Staff should make every effort to remove the tag in person. However, if circumstances prohibit returning to the facility within this time frame (e.g., insufficient staff resources), staff may send a letter to the owner and operator authorizing removal of the delivery prohibition tag (see **Appendix-K**). Staff may fax or email the letter but should follow up by mailing the authorization letter by first class mail. Staff should also notify OSRR's Legal Coordinator, who will request that the OSRR webmaster remove the facility or tank from DEQ's Delivery Prohibition web page. OSRR will also send out an email to subscribing delivery companies notifying them that the tag(s) have been removed from the facility's tank(s).

Once a tag is removed, it should be returned to OSRR.

5.5 Non-expedited Process

For all non-expedited, potential violations of Parts II, III, IV or VI of the UST Technical Regulation or the requirements of the UST Financial Responsibility Regulation, staff must give the owner or operator a reasonable amount of time to correct the deficiency(s) before moving into the delivery prohibition process (see **Appendix-C** for a listing of the compliance issues that warrant a non-expedited delivery prohibition proceeding.).

NOTE: Delivery prohibition cannot be used to address violations of Part VII of the Regulation (failure to close). However, tanks that are not properly closed are subject to the regulatory requirements pertaining to active tanks, such as release detection and corrosion protection requirements, and these potential violations should be included on the inspection report and RCA. Delivery prohibition also should not be used to address a potential violation of Registration or Operator Training requirements unless at least one other potential violation from Appendix-C remains unresolved. Generally, central office staff will address potential violations of the Financial Responsibility Regulation through 1186 proceedings, and delivery prohibition, if necessary.

5.5.1 Initiating the Compliance Process

When integrating delivery prohibition into the standard compliance and enforcement process, regional staff should first follow the process discussed in Section 2 and Section 3 to provide the owner or operator with an opportunity to come into compliance before initiating delivery prohibition.

5.5.2 Initiating the Delivery Prohibition Process

By the time the NOV has been issued, staff generally will have moved through the steps discussed in Sections 2 and 3 (RCA, Warning Letter, etc.) and will have been unsuccessful in obtaining compliance. It is important to document that the owner has been provided ample time and opportunity to return to compliance before proceeding to the delivery prohibition process. After the NOV has been issued, depending on the circumstances, staff may choose to go directly to the delivery prohibition process. In other circumstances, staff may pursue a consent order before utilizing delivery prohibition. If attempts to obtain a consent order fail, it is appropriate to begin delivery prohibition proceedings.

Staff may also choose to pursue both delivery prohibition and a consent order at the same time, or, more commonly, request delivery prohibition in an 1186 proceeding. Pursuing delivery prohibition through an 1186 proceeding offers staff the option to impose a civil penalty as well as delivery prohibition. In situations where the delivery prohibition IFF is combined with an 1186 IFF proceeding, DE staff will coordinate and act as DEQ's advocate at the proceeding. These IFFs tend to be more formal in tone, and the presiding officer does not issue an immediate decision. Instead, the presiding officer will recommend a course of action to the DEQ Director who will sign the final order. After an order is issued, the remaining procedures in this Guidance will apply.

5.5.3 Integrating Delivery Prohibition into the NOV /Consent Order Process

In a typical enforcement action, regional staff generally issue the NOV and hold a meeting within a short time period to discuss the violations and the owner's plan to return to compliance. At this time, staff often present a draft consent order for discussion. Depending on the circumstances of the case, DEQ's goals, and the most effective means to meet those goals, staff may choose to pursue either the consent order or the delivery prohibition process, or staff may pursue both concurrently.

If staff pursue a consent order first, staff should explain to the owner that delivery prohibition is a tool that could be pursued at a later date if the alleged violations remain unresolved. If staff decide to pursue delivery prohibition before entering the consent order process, then it is also appropriate to explain to the owner that the delivery prohibition process does not prevent a consent order at a later date.

If staff pursue delivery prohibition first, staff may streamline the process, by providing a Notice of Delivery Prohibition Proceedings to the owner and operator[24] during the NOV meeting and then hold the delivery prohibition IFF at a later date. Staff may also provide the Notice by mail after holding the NOV meeting. Under some limited[25] circumstances, staff may wish to provide the Notice prior to the NOV meeting and hold the Delivery Prohibition IFF during the NOV meeting. If staff choose this approach, staff must be sure to provide both the owner and operator with the Notice before the meeting.

[24] Owners are generally pursued first for compliance in the UST program. However, once delivery prohibition proceedings are initiated, the operator must be included in all correspondence and become a party to all delivery prohibition proceedings.

[25] This option is appropriate when the owner has a history of non-compliance, has multiple non-compliant facilities or has been unresponsive.

NOTE: In some cases (see Section 3), staff may choose to move directly to a Notice of Violation without first issuing a Warning Letter. In this circumstance, it is not appropriate to move directly into the delivery prohibition process at the NOV meeting, as described above. The owner and operator should be given a reasonable opportunity to comply before initiating delivery prohibition proceedings.

If staff have issued an NOV and the owner has failed to respond within the time prescribed in the NOV, either to propose a schedule for returning to compliance or set a meeting date, staff can initiate the delivery prohibition process. This applies regardless of whether a Warning Letter was issued before the NOV.

5.5.4 Central Office Coordination

On the regular process track, regional staff **must** email Delivery Prohibition candidates to the OSRR Legal Coordinator and the Central Office Tank Enforcement Manager for review and consultation. Staff may submit an Enforcement Recommendation and Plan if one has been drafted or staff may send an email that identifies the facility name and ID number, the inspection date, the alleged violations, the identity of the owner and operator, and a brief summary of the case with a chronology. Regional office staff should obtain any required regional concurrence/approval before proposing the candidate to OSRR. Central office will review and confer on whether to proceed with the delivery prohibition process. If central office concurs that delivery prohibition is suitable, OSRR will communicate this to the region via email. If central office disagrees, OSRR will communicate that decision along with the rationale for disagreement. In such cases, delivery prohibition will not proceed. OSRR will copy DE on all decisions and the Land Protection & Revitalization Division Director on decisions that concur with pursuit of delivery prohibition.

5.5.5 Delivery Prohibition Process

Once staff have mailed or hand delivered the Notice of Delivery Prohibition Proceedings to the owner and operator identifying the potential delivery prohibition violation(s) and scheduled the meeting, the delivery prohibition process will follow the steps outlined in the Expedited Process section above.

NOTE: In most, if not all, cases where staff identify "not equipped to comply" violations during an inspection, staff will also find other violations. This means that staff generally will be proceeding down two separate tracks to address all of the violations identified at the facility, i.e., expedited delivery prohibition to address the "not equipped to comply" type violations

and the normal compliance/enforcement process to address other violations identified at the same inspection.

5.6 Facility-wide Delivery Prohibition

9VAC25-580-370(F) provides that the board, after Notice and a Delivery Prohibition IFF, may classify all USTs at a facility as ineligible for delivery if one or more tanks has been so classified for more than 90 days. Staff should consider utilizing this provision when the owner/operator has made no attempt to return the tagged tank(s) to compliance for more than 90 days and the tagged tank(s) poses an imminent risk to the environment. What constitutes an imminent risk is fact specific and will be handled on a case-by-case basis in consultation with central office. Again, staff must hold another IFF to establish that one or more tagged tanks at the facility has not returned to compliance before the remaining regulated tanks at the facility can be tagged.

5.7 Emergency, Rural or Remote Exception

9VAC25-580-370(I) provides that if the board determines that a delivery prohibition violation exists, it can consider whether the threat posed by the violation is outweighed by the need for fuel from those USTs to meet an emergency situation or to meet the needs of a rural and remote area. If the board finds that such a condition outweighs the immediate risk of the violation, the board may defer imposition of delivery prohibition for up to 180 days. In every such case the director shall consider (i) issuing a special order under the authority of subdivision 10 of § 10.1-1186 of the Code of Virginia prescribing a prompt schedule for abating the violation and (ii) imposing a civil penalty.

If staff suspects that these circumstances exist, staff should consult with central office before proceeding. In addition, the boilerplate Notice (see **Appendix-D**) will require any owners/operators who seek to request this exception to raise it during the Delivery Prohibition IFF.

6 Subsequent Inspections at Red Tagged Facilities[26]

Once delivery prohibition has been imposed at a facility, it is appropriate to increase the inspection frequency for those facilities that have recently been tagged and returned to compliance and those that have recently been tagged and remain tagged. This section also details appropriate compliance follow-up activities for these classes of facilities.

6.1 Operating Facilities/Businesses where red tags remain on the tanks

A facility with one or more red tagged USTs may still remain in operation by:

1. Selling the remaining fuel in tagged tanks;
2. Selling fuel from tanks at the facility that are not tagged; or
3. Continuing to run a business on the property (e.g., the convenience store) until the tagged tanks can be returned to compliance and begin dispensing fuel again.

Inspection frequency and follow-up:

Staff should perform a site visit at these operating facilities within 3 to 6 months after attaching the tags to ensure that the tags are still attached. If any of the tags have been removed or there is information to suggest that fuel has been added to any tagged USTs without permission, the inspector should immediately report this to the regional Petroleum Programs Manager and to OSRR.

Staff can expand the site visit to a formal inspection if they observe other potential noncompliance issues that would merit an RCA. In this case, staff should initiate compliance follow up in conformance with Section 3 and notify the enforcement staff involved with the delivery prohibition proceeding of the new compliance issues. If the inspector does discover new compliance issues, staff may choose to make a second follow up site visit at their discretion, resources allowing. If staff do not discover additional issues during the site visit, or the gravity of the issues is slight, then the inspection frequency should continue within the existing 3 year cycle.

[26] Regional staff, at their discretion, may want to increase inspection frequency and follow this subsequent inspection guidance for other facilities, such as those that have returned to compliance through a consent or unilateral order.

6.2 Operating Facilities/Businesses that have returned to compliance with tags removed

Inspection frequency and follow-up:

Staff should perform a site visit within 6 to 12 months following the removal of the tag(s) to inspect for items that were found in violation during the red tag proceeding. If staff discover new compliance issues, staff should expand the site visit to a formal inspection and issue a new RCA. However, if some or all of the potential noncompliance includes some or all of the issues that resulted in delivery prohibition, and the owner/operator is the same, staff should issue an NOV and refer the case to enforcement.

If the inspector does discover new compliance issues, staff may choose to make a second follow up site visit at their discretion, resources allowing. If staff do not discover additional issues during the site visit, or the gravity of the issues is slight, then the inspection frequency should continue within the existing 3 year cycle.

6.3 Non-operating Facilities where tags remain on the tanks

A facility is "Non-operating" if the owner/operator is no longer operating the tanks or dispensing fuel at the facility, and has not evidenced any intent to do so in the future.

Inspection frequency and follow-up

The inspection frequency at a non-operating facility with tagged tanks will depend upon whether the inspector has reason to believe the facility may come back into operation (e.g., the facility is in a marketable area and generally experiences high ownership turnover).

- For those facilities that may come back into operation, staff should visit the site within 12 months to ensure the tags remain in place. If the tags are still in place, then staff can place the facility back into the existing 3 year inspection cycle[27].

- For those facilities that appear to be abandoned and unlikely to come back into operation (e.g., no dispensers, remote location, etc.), staff should inspect on the normal 3 year cycle. Inspectors should only rarely encounter this type of tagged facility.

[27] Staff may also consider alerting the locality that the tanks at the facility have been tagged. The fire department, the planning and zoning department, the building inspections department and the economic development department may all have a stake in the future of the site and may use the red tag information in their planning and permitting processes. If the locality is aware of the tagged tanks, it may take this into consideration and encourage compliance as it processes application, permit and incentive requests.

Delivery Prohibition is rarely used for these types of facilities due to the amount of time and resources involved.

If any of the tags have been removed or fuel has been added to any tagged USTs without permission, or the facility is in operation again, the inspector should immediately report this to the regional Petroleum Programs Manager and to OSRR.

Occasionally, inspectors may find that tagged tanks at non-operating facilities are out of compliance with other requirements. An example is a facility with tanks that remain tagged for release detection but sometime later are overdue for a corrosion protection test. In these cases, the inspector should send a letter to the owner outlining the noncompliance and stating that the issues should be addressed before bringing the tanks back into service. The inspector should then put a copy in the file and administratively close the compliance case in CEDS. (See **Appendix-L** for boilerplate letter).

Appendix-A Sample Initial Contact Letter to Landowner

[date]

[Landowner Name and Address]

RE: USTs at [facility name and facility address]

[Facility ID #]

Dear :

On [date], a Department of Environmental Quality (DEQ) inspector visited the above-referenced facility to determine the compliance status of the underground storage tanks (USTs). The results of the inspection are attached. [Describe any information known regarding the status of the registered owner.]

Pursuant to 9VAC25-580-70 of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[28] (UST Regulation), "...Any change in ownership, tank status...requires the UST owner to submit an amended notification form within 30 days after such change..." To date, DEQ has not received information required by state regulations to be submitted when a UST undergoes ownership transfer and temporary or permanent closure.

USTs that are no longer in use should be placed into temporary closure or permanently closed. Part VII of the UST Regulation, Out of Service UST Systems and Closure, outlines specific requirements for the temporary and permanent closure of USTs.

9VAC25-580-310 which addresses temporary closure states:

- A permit must be obtained from the local building official prior to the temporary closure;
- Owners and operators must continue operation and maintenance of corrosion protection in accordance with 9VAC25-580-90 and any release detection in accordance with Part IV. *(Release detection is deferred if the product level is below one inch);*
- When a UST system is temporarily closed for more than three months, owners

[28] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at Chapter 580 .

and operators must leave vent pipes open and functioning and cap and secure all other lines, pumps, manways and ancillary equipment;

- When a UST system is temporarily closed for more than twelve months, owners and operators must permanently close the UST system if it does not meet either performance standards in 9VAC25-580-50... or 9VAC25-580-60. Owners and operators must permanently close the substandard UST systems at the end of this twelve month period in accordance with 9VAC25-580-320 through 9VAC25-580-350, unless the building official grants an extension of the twelve months closure period. Owners and operators must complete a site assessment in accordance with 9VAC25-580-330 before an extension can be applied for. *(If corrosion protection of the tanks is adequately maintained, the tanks may be placed in temporary closure indefinitely.)*

Pursuant to 9VAC25-580-320 of the UST Regulation, the following requirements must be met when a UST is permanently closed:

- A permit must be obtained from the local building official prior to the closure;

- A site assessment must be performed in accordance with 9 VAC 25-580-330;

- The tank must be emptied and cleaned by removing all liquids and accumulated sludges, and either removed from the ground or filled with an inert, solid material (e.g. cement slurry, sand);

- Within 30 days after the completion of the closure, a 7530-2 UST Notification Form must be submitted to DEQ reflecting the closure of the tank.

A site assessment generally consists of soil or water samples being taken around the immediate vicinity of the excavated UST and piping, in the area where a release is most likely to be detected, to determine the level, if any, of total petroleum hydrocarbons in the soil or water. Samples must be analyzed using EPA or DEQ approved methods. Results from vapor or groundwater monitoring performed in accordance with 9VAC25-580-160 are acceptable in lieu of soil or ground water samples during UST closure. The results of the site assessment, along with a site map detailing the UST system, buildings and roads, the sample or monitoring locations, and any other important features, must be submitted to DEQ along with the 7530-2 UST Notification Form. Please refer to 9VAC25-580-320 and 9VAC25-580-330 of the UST Regulation.

In addition, the locality where the tanks are located may have building and/or fire codes that require the tanks to be emptied.

As the real property owner you may have ownership liability with regards to these tanks. Please be aware that if these tanks contain fuel, and the tanks begin to leak, your property and possibly your neighbors' properties could become contaminated. If that occurs, state law requires cleanup measures to be conducted.

If you hold title to the property as a foreclosing lender then you may be entitled to a lender liability exemption to storage tank compliance and cleanup requirements. You may download the lender liability exemption guidelines at http://www.deq.virginia.gov/Portals/0/DEQ/Land/Tanks/lendrleg.pdf.

Please respond to this letter by contacting [inspector name] at ### or [email address] no later than [date], indicating what actions may already have been taken, or what actions you plan to take to return the tanks to compliance or close the tanks. If you contend that you are not the tank owner then please submit documentation to support that assertion.

Sincerely,

[name]

Petroleum Programs Manager

Enclosure

cc: Compliance File

Local Fire Marshal

Appendix-B Letter to Landowner Closing Compliance Case

[date]

[Name and address]

Re: Underground Storage Tanks located at [facility address]
[Facility ID #]

Dear :

By letter dated [date], the Department of Environmental Quality (DEQ) requested that you take certain actions to bring the petroleum underground storage tanks ("USTs") located on your property into compliance with the UST Technical Regulation (9VAC 25-580). To date, DEQ has not received any documentation to indicate the tanks are in compliance with the Regulation or have been properly closed.

This is to advise you that DEQ's database has been changed to indicate the regulated USTs on the property are permanently out of use, however proper closure documentation was not submitted, which could result in enforcement action. The compliance action remains unresolved in our database.

For your information, our database and files are frequently reviewed by prospective purchasers, insurers, and lenders during property transfers and refinancing. The presence of noncompliant petroleum storage tanks on your property may impact a future sale or refinancing action. Further, if these tanks contain fuel and the tanks begin to leak, your property and possibly your neighbors' properties could become contaminated. If that occurs, state law requires cleanup measures to be conducted, and you may incur liability to other parties for damage caused by the contamination.

Please call me at [####] if you have any questions.

Sincerely,

Petroleum Programs Manager

Appendix-C Underground Storage Tank Delivery Prohibition Decision Matrix[29]

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (to be interpreted broadly – read "All other violations, for example...")
Spill Prevention		
Spill Buckets/Spill Containment	▪ Not installed	▪ Collar not seated around fill port ▪ Cracked or damaged
Overfill Prevention		
Ball Float	▪ Not installed (i.e., not able to be observed or verified via owner certification on 7530 or installation records by inspector)	▪ Not functioning (broken ball/cage)
Automatic Shutoff	▪ Not installed	▪ Improperly installed ▪ Not functioning (flapper works but bent, etc.)
Alarm	▪ Not installed	▪ Installed in a manner that impedes proper functionality ▪ Not functioning (alarm is not visually accessible or audible to delivery driver, does not always work, needs repair)
Corrosion Protection		
Galvanized or Bare Steel Tank/Piping (including Sti-P3 tanks)	▪ No Cathodic Protection installed ▪ CP (impressed current) verified to have been turned off more than 180 days AND no recent integrity assessment has been performed.	▪ 3-yr. testing not documented/failed test ▪ Flex connectors buried in soil and/or gravel (i.e. need to be unburied, CP or boot) ▪ Impressed current CP 60 day rectifier reading records missing ▪ No CP on tank manifold siphon bar ▪ CP (impressed current) turned

[29]This Matrix is based on a narrow interpretation of Section 370 of the Regulation to identify a manageable subset of circumstances that would benefit most from immediate action. As the agency and the regulated community gain experience with the delivery prohibition process and its application, the Matrix may be modified to expand the list of violations which warrant the expedited process. Nothing in this Table is intended to conflict with the information contained in the DEQ Petroleum Storage Tank Compliance Manual (2001).

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (to be interpreted broadly – read "All other violations, for example...")
		off for less than 180 days ▪ Violations of tank lining reqts
Release Detection (Tank)		
Inventory Control + TTT	▪ No data collected AND no precision tank tightness test AND no stick or measuring device	▪ Equipment not calibrated, damaged or not functional (e.g., stick too short or damaged) ▪ Not reconciled to 1%+130 gallons ▪ Method expired (e.g., > 10 years) ▪ Weekly stick readings only
Manual Tank Gauging	▪ No data collected AND no precision tank tightness test (if applicable) AND no stick or measuring device	▪ Criteria for method not followed (e.g. incorrect math) ▪ Tank >2,000 gallons (invalid method) ▪ Method expired (e.g., > 10 years) ▪ Conducted only once per month
ATG	▪ No console control box OR no probe	▪ Unplugged ▪ Not programmed correctly ▪ Damaged or malfunctioning probe ▪ Broken printer
Vapor Monitoring	▪ No monitoring well OR no vapor detecting or measuring device	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Groundwater Monitoring	▪ No monitoring well OR no detecting or measuring device	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Interstitial Monitoring	▪ Interstitial Monitoring has no control box, sensor, or measuring device	▪ Criteria for method not followed ▪ Equipment damaged ▪ Unplugged device ▪ Not performed for tanks installed after 9/15/10
Statistical Inventory Reconciliation (SIR)	▪ No measuring device (stick/probe) AND no paid vendor contract AND no data collected	▪ Criteria for method not followed ▪ Records missing ▪ Failed results

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (To be interpreted broadly—read "All other violations" for example)
Release Detection - Pressurized and Gravity Fed Piping		
Automatic Line Leak Detector (ALLD) + Annual Line Test	▪ No ALLD present	▪ Line test not documented ▪ ALLD not programmed correctly ▪ ALLD (mechanical) not tested ▪ No records
ALLD + ATG/LLD	▪ No ALLD present	▪ ATG unplugged or not programmed correctly ▪ ALLD (electronic) not tested in accordance with manufacturer's requirements ▪ No records
ALLD + Vapor Monitoring	▪ No ALLD present OR no monitoring well	▪ Criteria for method not followed (e.g., site assessment not performed) or no records ▪ ALLD (mechanical) not tested
ALLD + Groundwater Monitoring	▪ No ALLD present OR no monitoring well	▪ Criteria for method not followed (e.g., site assessment not performed) or no records ▪ ALLD (mechanical) not tested
ALLD + Interstitial Monitoring	▪ No ALLD present OR no sump sensors (and visual monitoring is not an option)	▪ Criteria for method not followed or no records ▪ ALLD (mechanical) not tested ▪ Interstitial monitoring not performed for piping installed after 9/15/10[30]
ALLD + SIR	▪ No ALLD present ▪ No measuring device (stick/probe) AND no paid vendor contract AND no data	▪ Criteria for method not followed ▪ Records missing ▪ ALLD (mechanical) not tested

[30] Interstitial monitoring is required for newly installed piping or greater than 50% of piping has been replaced.

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (To be interpreted broadly—read "All other violations" for example)
Release Detection Unsafe Suction Piping – Regulated		
Line Tightness Testing	▪ No record that precision line tightness test was ever performed	▪ Criteria for method not followed ▪ Precision line tightness test exceeds 3 years
Vapor Monitoring	▪ No monitoring well OR no records	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Groundwater Monitoring	▪ No monitoring well OR no records	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Interstitial Monitoring	▪ No line/sump sensors AND visual monitoring is not an option	▪ Criteria for method not followed ▪ Results recorded greater than every 30 days
SIR	▪ No measuring device AND no paid vendor contract AND no data	▪ Criteria for method not followed ▪ Records missing
Secondary Containment		
		▪ New single-walled tank installed on or after 9/15/10 OR ▪ Entirely new single-walled piping installed on or after 9/15/10 OR ▪ Single-walled piping replaced greater than 50% of original piping on or after 9/15/10 ▪ Not performing interstitial monitoring for tank/piping systems installed on or after 9/15/10 ▪ Failure to install a dispenser pan when required

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (To be interpreted broadly—read "All other violations" for example)
Registration[31]		▪ Failure to register ▪ Failure to amend registration
Operator Training[32]		▪ Failure to obtain or provide records for Class A, Class B, or Class C training. ▪ Failure to provide written emergency response procedures ▪ Failure to post emergency response procedures (unmanned facilities only)
Financial Responsibility[33]		▪ Failure to demonstrate financial responsibility or maintain current financial responsibility documentation
Suspected Release Confirmation	▪ Failure to investigate or confirm	▪ Improper investigation or low risk area

[31] Potential registration noncompliance should only be included in a delivery prohibition Notice if there is at least one other violation (excluding operator training).

[32] Potential Operator Training noncompliance should only be included in a delivery prohibition Notice if there is at least one other potential violation (excluding registration).

[33] Potential violations of the Financial Responsibility Regulation (9VAC 25-590) generally will be addressed by Central Office staff. In the rare case where the region may be pursuing compliance for financial responsibility, these types of potential violations should only be included in a delivery prohibition Notice if there is at least one other potential violation (excluding registration and operator training).

Appendix-D Notice of Delivery Prohibition Proceedings (Informal Fact Finding Proceeding)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility name, address, VA.]
[Facility ID]

Dear xxxxx:

You are hereby notified that, pursuant to § 2.2-4019 of the Code of Virginia ("Va. Code"), the State Water Control Board, (the Board) acting through the Department of Environmental Quality (DEQ or the Department), will conduct an Informal Fact Finding Proceeding on [xxxxx at xxx a.m./p.m.]. The purpose of the Proceeding is to determine whether the underground storage tank(s) (USTs) located at this facility and listed in this Notice are ineligible for delivery, deposit, or acceptance of a regulated substance based on violation(s) of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation,[34] (the Regulation) as described below.

This letter notifies you of information upon which DEQ may rely to make a case decision in this matter. In addition to the information provided with this Notice, DEQ may rely on any documents and information in the Department's file on this matter, along with the applicable law and agency precedent. The files are public documents and are available for your inspection at the DEQ's [xxx] Regional Office located at [address] or you may request a copy of the file be sent to you via email or regular mail.

OBSERVATIONS AND LEGAL REQUIREMENTS

On [date], DEQ staff conducted an inspection of the UST(s) at [facility address]. File and UST registration documents were also reviewed. A copy of the Request for Corrective Action [and/or

[34] 9VAC25-580-10 *et seq*. The Regulation can be found at: Chapter 580.

Inspection Report] is enclosed, which describes the staff's factual observations and identifies the applicable legal requirements.

These potential violations remain unresolved and will be the subject of the Proceeding:

[Use the Observations and Legal Requirements format used for Warning Letters and Notices of Violation to list potential violations and identify which UST(s) are implicated]

PROCEDURES

DEQ will conduct the Informal Fact Finding Proceeding before [Name of Presiding Officer], an employee of DEQ. You may appear in person or by counsel or other qualified representative to present factual data, argument, or proof in connection with this case. DEQ may rely on the enclosed documents to substantiate the alleged violations, as well as other documents in its files.

[Name] will represent DEQ at this Proceeding. Based upon DEQ's file and the record of this Proceeding, DEQ will be requesting that the Presiding Officer find that the referenced UST(s) at [facility name] are in violation of the Regulation and ineligible for delivery, deposit or acceptance of a regulated substance based on 9VAC25-580-370 of the Regulation.[35]

RESOLUTION

Please contact [Inspector] at [(xxx) xxx-xxxx] if you wish to resolve the potential violations prior to the Informal Fact Finding Proceeding. If you complete the necessary work to resolve the potential violations prior to the date of the Proceeding, contact [Inspector name] immediately so that compliance can be verified. You must provide a written report and appropriate documentation demonstrating that compliance has been achieved 3 business days prior to the Proceeding. If compliance is verified, the Proceeding will be cancelled and the UST(s) will be eligible for receipt of a regulated substance. If compliance is not verified, the Proceeding will go forward as scheduled.

You may waive your right to an Informal Fact Finding Proceeding by submitting a request for waiver prior to the date of the Proceeding. The request shall be in writing and signed by the owner of the UST and include a statement that no material facts are in dispute and that the owner waives his right to an Informal Fact Finding Proceeding and to any other administrative proceeding regarding the potential violations described herein.

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[35] You may request to be heard on the Emergency, Rural or Remote Exception. 9VAC25-580-370(I) provides that if the Presiding Officer, acting on behalf of the Board, determines that a delivery prohibition violation exists he or she can consider whether the threat posed by the violation is outweighed by the need for fuel from the UST(s) to meet an emergency situation or to meet the needs of a rural and remote area. If it is determined that such a condition outweighs the immediate risk of the violation, the Presiding Officer may defer imposition of delivery prohibition for up to 180 days. In every such case the director shall consider (i) issuing a special order under the authority of subdivision 10 of § 10.1-1186 of the Code of Virginia prescribing a prompt schedule for abating the violation and (ii) imposing a civil penalty.

FUTURE ACTIONS

If you waive your right to an Informal Fact Finding Proceeding or if these tanks are determined to be in violation of 9VAC25-580-10 *et seq.* and ineligible for delivery, a delivery prohibition notice ("red tag") will be placed on the fill port of the ineligible UST(s) and delivery, deposit or acceptance of a regulated substance into the UST(s) will be prohibited until such time as the UST(s) are returned to compliance. Please be advised that removal of the red tag is prohibited by 9VAC25-580-370 unless authorized, in writing, by DEQ. In addition, for each alleged violation, DEQ is authorized to pursue enforcement actions, seek civil penalties and seek compliance with its rules and regulations in any manner allowed by law.

Please contact [Name of Presiding Officer] within 5 business days of the date of this letter to confirm whether you and/or a representative will attend the Proceeding or with any questions relating to this Proceeding. [He/she] can be reached at [(xxx) xxx- xxxx.]

Please note that unless the potential violations are resolved or the owner waives his right to an Informal Fact Finding Proceeding, the Informal Fact Finding Proceeding will be held regardless of whether you or your representative chooses to attend.

Sincerely,

Regional office

Enclosures

cc: Presiding Officer
RO Agency Advocate
OSRR Director
RO Petroleum Programs Manager
Tank Enforcement Manager

Appendix-E Waiver of Delivery Prohibition Informal Fact Finding Proceeding

[DEQ CONTACT]
[DEQ RETURN ADDRESS]

RE: Waiver of Informal Fact Finding Proceeding Concerning Delivery Prohibition
[Facility Name]

I, [UST OWNER and/or OPERATOR], certify that I am the [owner or operator] of the [UST # or UST SYSTEM] located at [ADDRESS] and that I have been given notice of an informal fact finding proceeding to be held in accordance with Va. Code §2.2-4019 to determine whether [UST # or UST SYSTEM] shall be ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance pursuant to 9VAC25-580-370.

I, [UST OWNER or OPERATOR], acknowledge that there are no material facts in dispute with respect to the alleged violations as identified in the proceeding notice and hereby waive my right to an informal fact finding proceeding and to any other administrative proceeding regarding the imposition of delivery prohibition on [UST# or UST SYSTEM].

I, [UST OWNER or OPERATOR], understand that as a result of this waiver, the Department of Environmental Quality will make a finding to impose delivery prohibition, and shall affix a red tag to the fill pipe of [UST # or UST SYSTEM] prohibiting delivery, deposit, or acceptance of a petroleum or other regulated substance.

I, [UST OWNER or OPERATOR], understand that no person shall deliver to, deposit into, or accept a petroleum product or other regulated substance into [UST # or UST SYTEM] unless authorized in writing by the Department of Environmental Quality and that no person shall alter, deface, remove, or attempt to remove the red tag that prohibits delivery, deposit, or acceptance of a petroleum product or other regulated substance to [UST# or UST SYSTEM] until such time as there is a return to compliance.

_____

[OWNER NAME / DATE **or** OPERATOR NAME/ DATE]
[FACILITY NAME]
[FACILITY ADDRESS]

Appendix-F Delivery Prohibition Return to Compliance Letter (pre-Informal Fact Finding)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Termination of Delivery Prohibition Proceedings

Dear [owner and operator]:

On (DATE), the Department of Environmental Quality (DEQ), staff conducted an inspection of the underground storage tank(s) (USTs) at (FACILITY ADDRESS). Staff also reviewed file and UST registration documents. Staff's factual observations and the applicable legal requirements were identified in the Notice of Delivery Prohibition Proceedings that was issued on (DATE).

On [DATE], the [name of owner or operator] submitted supporting documentation to demonstrate that the alleged violation(s) rendering the UST(s) ineligible for delivery have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff agrees that the alleged violation(s), has/have been resolved.

Accordingly, the delivery prohibition proceeding initiated to address these alleged violations is terminated and the Informal Fact Finding Proceeding scheduled for [insert date of IFF] is cancelled.

Please note that if DEQ discovers violations at this facility as a result of a future inspection or site visit, the UST(s) may again be subject to the delivery prohibition process at that time. Further, this letter has no bearing on any other enforcement actions that may be pending at this facility.

Please contact me at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-G Delivery Prohibition Insufficient Documentation Letter (pre Informal Fact Finding)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Insufficient Documentation Notice

Dear [owner and operator]:

On (DATE), the Department of Environmental Quality (DEQ), staff conducted an inspection of the underground storage tank(s) (USTs) at (FACILITY ADDRESS). Staff also reviewed file and UST registration documents. Staff's factual observations and the applicable legal requirements were identified in the Notice of Delivery Prohibition Proceedings that was issued on (DATE).

On [DATE], the [name of owner or operator] submitted supporting documentation to demonstrate that the alleged violation(s) rendering the UST(s) ineligible for delivery have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff does not agree that the alleged violation(s) has/have been resolved. The following items remain unresolved:

Note: include list of work to be done.

Please submit additional documentation demonstrating that this work has been completed to [inspector name and address] [staff can specify what documentation is necessary, if preferred]. If you wish to resolve the potential violations prior to the Informal Fact Finding Proceeding, contact [Inspector name] immediately so that compliance can be verified. You must provide the appropriate documentation demonstrating that compliance has been achieved 3 business days prior to the Proceeding. If compliance is verified, the Proceeding will be cancelled and the UST(s) will be eligible for receipt of a regulated substance. If compliance is not verified, the Proceeding will go forward as scheduled.

Please contact [inspector name] at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-H Delivery Prohibition Advocate Checklist

Exhibits to submit at the Informal Fact Finding (IFF):

Inspection Report(s) (along with inspector's explanation/observations and photos if violations are unclear). Photos should be numbered to match observations.

Any compliance documentation that confirms/refutes violations or compliance (test reports, job invoices, contracts to perform work, certifications, etc.)

Any compliance letters/notices from DEQ to the Responsible Person(s) (RP) (Deficiency Letter, RCA, Warning Letter, NOV, TCA/LOA, etc.)

Copies of any responses from the RP to DEQ (including phone logs, emails, etc.)

Copies of the Notice for referral for Delivery Prohibition Hearing (including any delivery confirmation if tank owner is not present)

Number all submittals and place in an Exhibit Book with a copy for the presiding officer and a copy for the owner and/or operator for ease of reference during the IFF.

Ownership documentation

Advocate Presentation:

First: Opening Statement: The advocate should introduce himself or herself, state his or her position, and indicate that they are presenting on behalf of the Department.
The advocate should provide a brief history of delivery prohibition. Provide Federal law requirements supporting VA's UST regulation and include references to the recent Federal law requiring delivery prohibition for non-compliant USTs. Also refer to the APA, 2.2-4019, as authority to hold the IFF.

Sample Opening Statement:

Personal Introduction.

The federal Energy Policy Act of 2005 and DEQ regulations make it unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank that has been determined by the US Environmental Protection Agency or the Virginia DEQ to be ineligible. Tanks that are in violation of certain pollution prevention and corrective action requirements are ineligible to receive deliveries of regulated substances. The purpose of this informal fact finding proceeding is to determine whether any USTs at this facility are non-compliant and thus ineligible for delivery, deposit, or acceptance of petroleum or other regulated substance.

Second: Describe the inspection(s) at the facility and provide the following info:

- the non-compliant UST(s) (substance stored, whether it is compartmentalized, tank number(s), tank capacity, etc.),
- the address of the UST facility,
- the tank owner and operator for the UST facility,
- the landowner,
- if the tanks are currently being used in operation of the facility or if the tanks are not currently in use, and
- if the tank owner and/or operator is not present, describe what actions were taken to provide notice to the owner/operator.

Third: Describe the compliance and enforcement history at the site. This will be especially relevant in the case of "Regular process" violations.

Fourth: Recite the alleged violation(s) and regulatory citations noted for each UST(s) and provide the supporting observations and/or documentation for each alleged violation. If more than one UST is included, review the alleged violations for each tank separately because a determination regarding the application of a red tag will be made individually for each tank identified in the Notice. Identify and discuss only the alleged violations specified in the Notice during the presentation.

Identify corresponding exhibits in the Exhibit Book when providing the supporting observations.

Note: You may choose to merge the third and fourth steps during your presentation.

Fifth: **Ask the Presiding officer to accept all documents into the records and to authorize use of delivery prohibition for each non-compliant UST.**

Owner/Operator makes presentation

Presiding Officer Asks Questions

Advocate's Sample Closing Statement:

DEQ has presented facts that prove that certain violations of the UST Regulation exist at this facility: [cite regulatory section and applicable tank numbers for each alleged violation]. Furthermore, it is DEQ's position that the described violations render tanks
#[ ] ineligible for delivery of regulated substances, including petroleum. I request that you find that these tanks are subject to delivery prohibition and are ineligible for delivery of petroleum due to their non-compliance and that you require a tag to be placed on the ineligible tank(s).

Optional addition to the presentation regarding the Emergency, Rural or Remote Exception **(if applicable)**:

9VAC25-580-370(I) provides that if the Presiding Officer determines that a delivery prohibition violation exists it can consider whether the threat posed by the violation is outweighed by the need for fuel from the UST(s) to meet an emergency situation or to meet the needs of a rural and remote area. In this case such an exception should be granted because...
If the Presiding Officer finds that this condition outweighs the immediate risk of the violation, the Presiding Officer may defer imposition of delivery prohibition for up to 180 days.

Appendix-I Decision and Notice of Delivery Prohibition

DEPARTMENT OF ENVIRONMENTAL QUALITY
Molly Joseph Ward
Secretary of Natural Resources
David K. Paylor
Director

DECISION AND NOTICE OF UNDERGROUND STORAGE TANK (UST) DELIVERY PROHIBITION

Date: _____

❑ Certified Mail or Delivery Conf. #: _____ Facility ID No.: _____

Facility Name: _____

Facility Address: _____

UST Owner: _____

UST Owner Address: _____

UST Owner Phone No.: Fax No.: _____

UST Operator: _____

UST Operator Address: _____

UST Operator Phone No.: Fax No.: _____

On or about _____(date)_____, the State Water Control Board (SWCB), acting through the Virginia Department of Environmental Quality (DEQ), held an informal fact finding proceeding (IFF) to review the potential violations observed during an inspection of this facility on (date)_____. The Proceeding was held to determine whether any of the USTs at the facility, which are owned by (owner name)_____ and operated by _____(operator name)_____ are in violation of any regulatory requirements contained in the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation (the Regulation) that would trigger delivery prohibition pursuant to section 25-580-370 of the Regulation. I , [Presiding Officer], have been appointed to make this determination.

Having reviewed the evidence presented at the Proceeding, I find that the following violation{s} noted during the inspection subject the USTs identified below to delivery prohibition status as specified in 9VAC25-580-370:

[In this space, the Presiding Officer should list out the violations that apply and the tanks to which they apply. The tanks should be identified by the DEQ tank number. Contact OSRR for sample language and format.]

You are hereby notified that no later than 5 business days from the date of this decision, DEQ staff will affix a tag to the fill pipe of the UST(s) listed below which will specify that the UST(s) are ineligible for delivery, deposit, or acceptance of a regulated substance.

Depositing or allowing deposit of a regulated substance into any of the tanks listed below or removing the delivery prohibition tag without prior DEQ approval constitutes a violation of 9VAC25-580-370 and may subject the violator to enforcement action.

Red Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored	Red Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored

You are further notified that the delivery prohibition tag will not be removed until the owner or operator of this facility makes the appropriate system repairs or upgrades, or remedies the stated noncompliance and provides a written report and appropriate documentation demonstrating that compliance has been achieved. Please provide your written report and documentation to (Inspector name, address and phone) _____. Staff will review the documents within 5 business days; if the documentation is insufficient, staff will outline the deficiencies in writing. Within 2 business days of confirming that one or more of the tagged USTs at the facility has been returned to compliance, DEQ staff, or the owner or operator if authorized in writing by DEQ, will remove the delivery prohibition tag and restore the status of the UST as acceptable for delivery of regulated substances.

DEQ may temporarily authorize an owner or operator to accept a limited amount of fuel into an ineligible UST if such activity is necessary to test or calibrate the UST(s) or dispenser system. Please contact _____ (Inspector name, phone) to submit this request.

For each violation described herein, or any other violation discovered during this inspection, DEQ reserves the right to issue enforcement actions and seek civil charges and the right to seek compliance with its rules and regulations in any manner allowed by law, and nothing herein shall be construed to preclude the right to seek such civil charges and compliance.

TIME FOR FILING A NOTICE OF APPEAL

This is a final case decision of the SWCB. If you wish to file a judicial appeal of this decision, Virginia Supreme Court Rule 2A:2 requires that you file a Notice of Appeal with the Director of the Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219 within 30 days of the date the final case decision was served upon you (33 days if service was accomplished by mail). This Notice of Appeal does not constitute an appeal to the Director; rather, it provides the legally required notice to the agency secretary that you intend to file an appeal in court. The Administrative Process Act and the Rules of the Supreme Court of Virginia contain other requirements that apply to such a judicial appeal.

Presiding Officer Signature	Phone No.	Date

If hand-delivered:

Received By: Signature	Print Name
Received By: Signature	Print Name

Appendix-J Delivery Prohibition Insufficient Documentation Letter (post decision)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Insufficient Documentation Notice

Dear [owner and operator]:

On [DATE], the Department of Environmental Quality (DEQ), acting on behalf of the State Water Control Board, held an Informal Fact Finding Proceeding in accordance with 9VAC25-580-370. The purpose of the Proceeding was to determine whether the underground storage tank(s) (USTs) at this facility were ineligible for delivery, deposit, or acceptance of a regulated substance based on violation(s) of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[36] 9VAC25-580-10 *et seq*. By decision dated [DATE], the DEQ determined that the following UST(s) at the referenced facility were in violation of [insert sections of regulation violated per UST] and ineligible to accept delivery or deposit of a regulated substance:

[Insert identifying tank information in grid below]

DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored	DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored

On [DATE] DEQ personnel attached a delivery prohibition tag to the ineligible UST(s) in accordance with 9 VAC 25-580-370.

On [DATE], the facility submitted supporting documentation to demonstrate that the violation(s) rendering the UST(s) ineligible for delivery has/have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff does not agree that the following violation(s) has/have been resolved.

[36] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at Chapter 580.

[Note: include list of work to be performed.]

Please submit additional documentation demonstrating that this work has been completed to [inspector name and address].

Please contact [inspector name] at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-K Return to Compliance/Delivery Prohibition Tag Removal Letter

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Delivery Prohibition Tag Removal

Dear [owner and operator]:

On [DATE], the Department of Environmental Quality (DEQ), acting on behalf of the State Water Control Board, held an Informal Fact Finding Proceeding in accordance with 9VAC25-580-370. The purpose of the Proceeding was to determine whether the underground storage tank(s) (USTs) at this facility were ineligible for delivery, deposit, or acceptance of a regulated substance based on violation(s) of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[37] 9VAC25-580-10 *et seq.* By decision dated [DATE], the DEQ determined that the following UST(s) at the referenced facility were in violation of [*insert* sections of regulation violated] and ineligible to accept delivery or deposit of a regulated substance:

[Insert identifying tank information in the grid below]

DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored	DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored

On [DATE] DEQ personnel attached a delivery prohibition tag to the ineligible UST(s) in accordance with 9VAC25-580-370.

On [DATE], the facility submitted supporting documentation to demonstrate that the violation(s) rendering the UST(s) ineligible for delivery have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff agrees that the violation(s), determined on [*insert* decision date] has/have been resolved.

[37] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at Chapter 580.

[Within 2 business days of the date of this letter, DEQ staff, in accordance with 9VAC25-580-370, will remove the delivery prohibition tag(s) from the above referenced USTs. Upon removal of the delivery prohibition tags, the USTs will be eligible for delivery, deposit or acceptance of a regulated substance.]

OR

[By this letter, you are authorized, pursuant to 9VAC25-580-370, to remove the delivery prohibition tag immediately. Upon removal of the delivery prohibition tag, the USTs are eligible for delivery, deposit, or acceptance of a regulated substance. You must return the delivery prohibition tags to DEQ at the following address: [*insert* regional office address].

Please note that it is DEQ's practice to inspect previously tagged facilities within six months to a year after the removal of the tags to insure continued compliance with the UST regulation. If DEQ discovers violations at this facility as a result of a future inspection or site visit, the USTs may again be subject to an expedited enforcement process, including the delivery prohibition process. Further, this letter has no bearing on any other enforcement actions that may be pending at this facility.

Please contact me at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-L Post-inspection Letter for Red-tagged Facilities

DATE

Name & Address

Re: Underground Storage Tank (UST) Compliance at xxxxxx

Facility Identification No. (FAC. ID. NO.): xxxxx

Dear Owner:

As you are aware, on (IFF proceeding date), the Department of Environmental Quality (DEQ) held an informal fact finding proceeding (IFF) that resulted in the determination that the (fill in #) USTs located at (facility name) are subject to the delivery prohibition guidelines of Regulation 9VAC25-580-370. A tag was subsequently placed on the fill ports of the USTs by DEQ staff marking them as ineligible for delivery, deposit, or acceptance of a regulated substance pending compliance with (Add brief description of violations, e.g. the registration and leak detection requirements set forth in the UST Technical Regulation (Chapter 580)).

On (inspection date), DEQ staff performed a routine compliance inspection at the facility and noted that, in addition to the items identified during the IFF, the facility had not maintained (Add brief description of violations, e.g., the cathodic protection system testing as required by Regulation 9VAC25-580-90.)

Please be aware that the (Describe new violation, e.g. cathodic protection system testing requirements found in Regulation 9VAC-25-580-90) must be met along with the items of non compliance identified in the IFF before the UST system can be brought back into active use.

If you have any questions regarding this matter, please contact me at (phone #) or via e-mail at (email address).

Sincerely,

Signature Line

Inspector name

cc: facility file

Appendix-M Return to Compliance Letter

DATE

Name
Company
Address

Re: Underground Storage Tank (UST) Facility Formal Compliance Inspection for «name»
Facility Identification No. (FAC. ID. NO.):

Dear [Name]:

[insert appropriate introductory paragraph]

Based upon a review of your submittal and our files for the site, it appears that the compliance issues noted during the UST inspection conducted on [date], related to the UST Technical Regulation (9-VAC25-580), have been addressed.

Please note that DEQ will continue to inspect this facility on a regular basis, and this letter has no bearing on any future compliance issues discovered at this facility.

If you have any questions or need additional information, please contact me at [phone number].

Sincerely,

Inspector Name
Staff Title

cc: facility compliance file

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Russell P. Ellison
UST Program Coordinator
Office of Spill Response & Remediation
Virginia Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218-1105

FEB 12 2015

RE: RCRA Proposed Amended Complaint, Compliance Order and Notice of Opportunity for Hearing EPA Docket No. RCRA-03-2013-0039

Dear Mr. Ellison:

On March 27, 2013, the U.S. Environmental Protection Agency, Region III (EPA), filed a Complaint, Compliance Order, and Notice of Opportunity for Hearing for underground storage tank violations, pursuant to the Resource Conservation and Recovery Act (RCRA). The Complaint addressed violations of RCRA Subtitle I by multiple respondents for the underground storage tanks located at the following facilities: Pure Gas Station, 5703 Holland Road, Suffolk, VA 23437; Franklin Eagle Mart, 1397 Carrsville Highway Franklin, VA 23851; and Rt. 58 Food Mart, 8917 S. Quay Road, Suffolk, VA 23437. The respondents included: Aylin, Inc.; Rt. 58 Food Mart, Inc.; Franklin Eagle Mart Corp.; and Adnan Kiriscioglu d/b/a New Jersey Petroleum Organization a/k/a NJPO. By letter dated December 7, 2011, you were notified of EPA's action.

EPA is seeking to file an amended Complaint for the above-referenced facilities for the same violations. The amended Complaint adds three additional respondents: 5703 Holland Road Realty Corp.; 8917 South Quay Road Realty Corp.; and 1397 Carrsville Highway Realty Corp. The proposed respondents are the owners of the USTs at the facilities. This letter notifies you in accordance with Section 9006(a)(2) of RCRA, 42 U.S.C. Section 6991e(a)(2), of EPA's intended action.

I appreciate your cooperation in this matter and look forward to your continued efforts toward a successful enforcement program. Should you have any questions regarding this matter, please contact me at (215) 814-5430 or Andrew Ma at (410) 305-3429.

Sincerely,

Carol Amend

Carol Amend, Associate Director
Office of Land Enforcement

CX 152

cc: A. Ma (3LC70)

EPA 2494

Suffolk Pure Station
Kinsey, David (DEQ) to: Andrew Ma 08/17/2012 01:17 PM

History: This message has been replied to and forwarded.

Andrew,

Here are the three documents from my inspection.

David

****

David J. Kinsey, Sr.
Petroleum Compliance Inspector
Tidewater Regional Office
Dept. of Environmental Quality
5636 Southern Boulevard
Virginia Beach, VA 23462
(757)518-2147

****

5008436+TTT+&+LTT[1].pdf 5008436+CP[1].pdf 5008436+RCA+&+CHKLST[1].pdf

CX 153

EPA 2495

VIRGINIA DEQ	CATHODIC PROTECTION SYSTEM EVALUATION FORM	7631-CP (11/05)

- This form should be utilized to evaluate underground storage tank (UST) cathodic protection systems in the Commonwealth of Virginia.
- Access to the [illegible], if an impressed current cathodically protected structure that is being evaluated must be provided.
- A site drawing depicting the UST cathodic protection system and all [illegible] must be submitted.

NAME: USP-NJPO		NAME: USP-NJPO			ID #
ADDRESS: 5703 HOLLAND RD.	ADNAN	ADDRESS: 5703 HOLLAND RD.			
CITY: SUFFOLK	PHONE: 561-566-4133	CITY: SUFFOLK			CONTACT: (DAWN @ NTCA)
STATE: SUFFOLK	ZIP: VA 23434	STATE: VA	ZIP: 23434		PHONE: 440-237-9200

Routine - 3 year	Routine – within 6 months of installation	90-day re-survey after [illegible]	X Re-survey after repair/modification

Date next cathodic protection survey must be conducted 6/15/12 (required within 6 months of installation/repair & every 3 years thereafter).

X	PASS	All protected structures at this facility pass the cathodic protection survey and it is judged that adequate cathodic protection has been provided to the UST system (indicate all criteria applicable by completion of Section VI)
	FAIL	One or more protected structures at this facility fail the cathodic protection survey and it is judged that adequate cathodic protection has not been provided to the UST system(s) (complete Section VII).

TESTER'S NAME: THOMAS HALL			SOURCE OF CERTIFICATION: NACE
COMPANY NAME: SUPERIOR SERVICES			TYPE OF CERTIFICATION: CORROSION TECHNICIAN
ADDRESS: PO BOX [illegible]			CERTIFICATION NUMBER: # 6414
CITY: HENDERSONVILLE	STATE: NC	ZIP: 28793	PHONE: 828-696-4288
CP TESTER'S SIGNATURE: [signature]			DATE SIGNED: 11/28/11 / DATE CP SURVEY PERFORMED: 11/16/11

The survey must be conducted and/or evaluated by a corrosion expert when: a) supplemental anodes or other changes in the construction of the cathodic protection system are made; or b) a document may be affecting buried metallic structures or c) an inconclusive result was written in Section VI (except for under STI-R972 – "Recommended Practice for the Addition of Supplemental Anodes to sti-P3® UST's")

X	PASS	All protected structures at this facility pass the cathodic protection survey and it is judged that adequate cathodic protection has been provided to the UST system (indicate all criteria applicable by completion of Section VI)
	FAIL	One or more protected structures at this facility fail the cathodic protection survey and it is judged that adequate cathodic protection has not been provided to the UST system (indicate what action is necessary by completion of Section VII).

CORROSION EXPERT'S NAME: LORRAINE GREEN			SOURCE OF CERTIFICATION: NACE
COMPANY NAME: GREEN ENVIRONMENTAL & CORROSION			TYPE OF CERTIFICATION: CP SPECIALIST
ADDRESS: PO BOX 2147			CERTIFICATION NUMBER: # 4801
CITY: LAWRENCEVILLE	STATE: GA	ZIP:	PHONE:
CORROSION EXPERT'S SIGNATURE: [signature]			DATE: 11/28/11

X	-850mV ON / (Instant) OFF	Structure-to-soil potential more negative than -850 mV with respect to a Cu/CuSO4 reference electrode with protective current ON (galvanic) or temporarily interrupted (instant-OFF (impressed)). Inconclusive?
	100 mV POLARIZATION	Structure(s) exhibit at least 100 mV of cathodic polarization. Inconclusive?

X	NONE	Cathodic protection is adequate. No further action is necessary at this time. Test again by no later than (see Section V).
	RETEST	Cathodic protection may not be adequate. Retest during the next 90 days to determine if passing results can be achieved.
	REPAIR & RETEST	Cathodic protection is not adequate. Repair/modification is necessary as soon as practical but within the next 90 days.

PROPERLY QUALIFIED VIRGINIA OPERATOR OR DEQ ENVIRONMENTAL QUALITY REPRESENTATIVE MUST SIGN BELOW
PO BOX [illegible] Woodbridge, Virginia [illegible] Regional Office

Total of 6 pgs! Attn: David Kinsey

From: Kim Bonin

6/15/12

EPA 2496

TANK #	PRODUCT	CAPACITY	TANK MATERIAL	PIPING MATERIAL	FLEX CONNECTORS
1	REG 1	6,000	STEEL/LINED	FRP	YES
2	REG 2	6,000	STEEL/LINED	FRP	YES
3	SUPER	6,000	STEEL/LINED	FRP	YES
4	DIESEL	6,000	STEEL/LINED	FRP	YES
5					

In order to conduct an effective evaluation of the cathodic protection system, a complete evaluation of rectifier operation is necessary.

RECTIFIER MANUFACTURER: ILPC

RATED DC OUTPUT: 40 VOLTS 9 AMPS

RECTIFIER MODEL: [illegible]T8A-40-5-CMPTW

RECTIFIER SERIAL NUMBER: 99C303

RECTIFIER OUTPUT AS INITIALLY DESIGNED OR LASTLY RECOMMENDED (if available): _____ VOLTS _____ AMPS

EVENT	DATE	TAP SETTINGS		DC OUTPUT		HOUR METER	COMMENTS
		COARSE	FINE	VOLTS	AMPS		
"AS FOUND"	11/[illegible]/11	8	2	16.06	2.74		
"AS LEFT"	11/[illegible]/11	8	2	16.06	2.74		

Complete if the system is designed to allow such measurements (i.e. individual lead wires for each anode are installed and measurement shunts are present).

CIRCUIT	1	2	3	4	5	6	7	8	9	10	TOTAL AMPS
ANODE (+)											
TANK (-)											

Complete if any repairs or modifications to the cathodic protection system are made OR are necessary. Certain repairs/modifications as explained in the text of the VADEQ cathodic protection guidance document are required to be designed and/or evaluated by a corrosion expert (completion of Section V required).

	Additional anodes for an impressed current system (attach corrosion expert's design);
X	Supplemental anodes for a STI-P3® tank or metallic pipe (attach corrosion expert's design or documentation industry standard was followed);
	Repairs or replacement of rectifier (explain in "Remarks/Other" below);
	Anode header cable repaired and/or replaced(explain in "Remarks/Other" below);
	Impressed current protected tanks/piping not electrically continuous (explain in "Remarks/Other" below);
	Galvanically protected tanks/piping NOT electrically isolated (explain in "Remarks/Other" below)

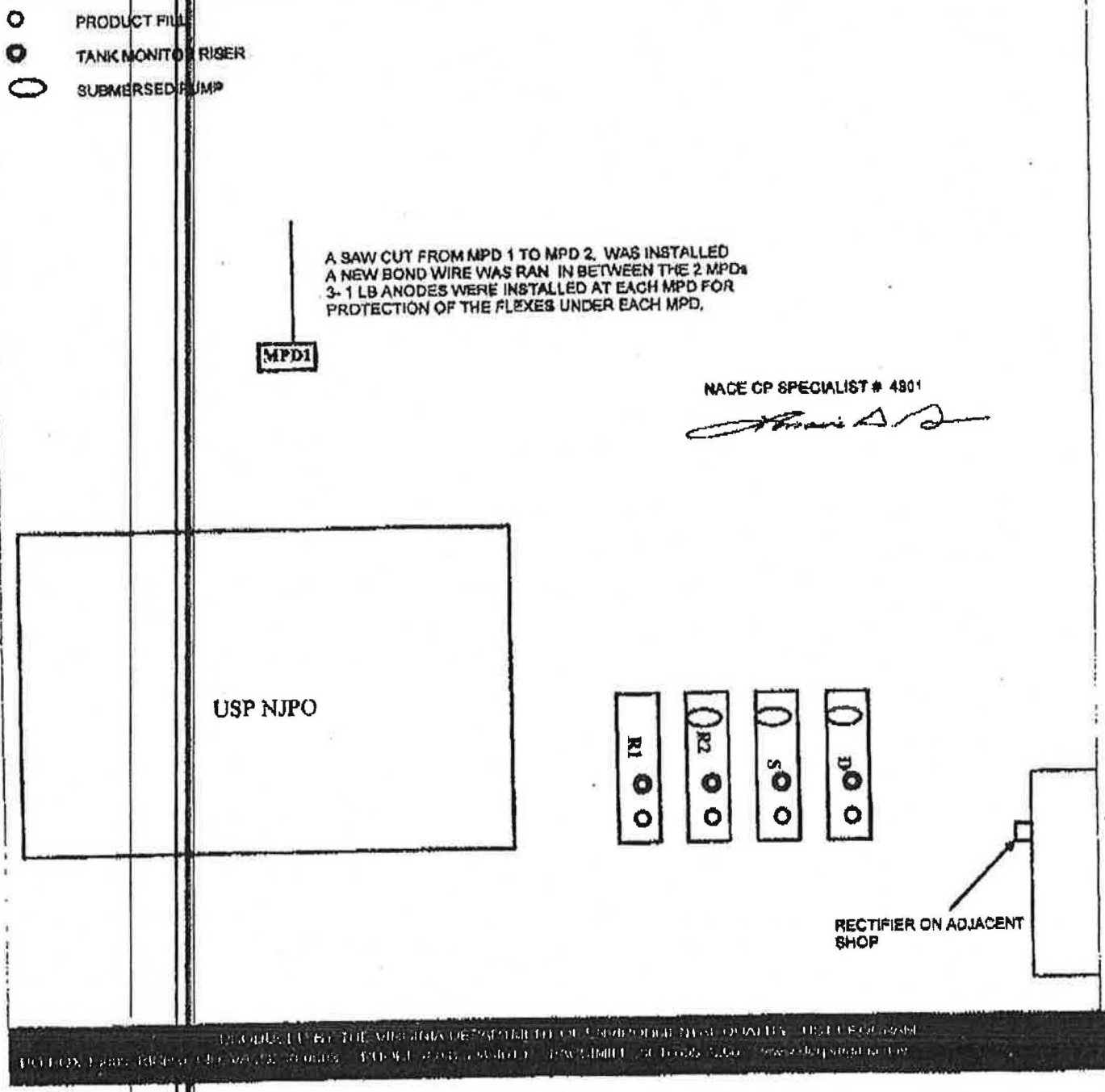
Remarks/Other: TANKS ARE INTERIOR LINED STEEL TANKS WITH IMPRESSED CURRENT. THE TANKS WILL ALL MEET CRITERIA. THERE ARE FLEXES AT MPD 1 & MPD 2. THESE FLEXES HAVE BEEN BONDED INTO THE IMPRESSED CURRENT SYTEM TO AVOID STRAY CURRENT DAMAGE. THEY ARE SO FAR FROM THE CLOSEST IMPRESSED ANODE THAT SACRIFICIAL ANODES WERE ADDED FOR THESE FLEXES PROTECTION. THE CORROSION EXPERT'S DESIGN IS ATTACHED. A TEST WILL BE REQUIRED WITHIN SIX MONTHS OF THIS REPAIR BEFORE THIS SITE WILL GO BACK ON A THREE YEAR SCHEDULE. BOTH THE VOLT AND METERS WERE NOT FUCTIONING PROPERLY BOTH WERE REPLACED.

[illegible]

EPA 2497

Attach detailed drawing of the UST and cathodic protection systems. Sufficient detail must be given in order to clearly indicate where the reference electrode was placed for each structure-to-soil potential that is recorded on the survey forms. Any pertinent data must also be included. At a minimum, indicate the following: all tanks, piping and dispensers; all buildings and streets; all anodes and wires; location of CP test stations; and, each reference electrode placement must be indicated by a code (1, 2, 3; R-1, R-2, R-3...etc.) corresponding with the appropriate line number in Section XIV of this form. (Note, CP test stations (PP4)may be questionable for use as described in Section 6.1.2)

AN EVALUATION OF THE CATHODIC PROTECTION SYSTEM IS NOT COMPLETE WITHOUT AN ACCEPTABLE SITE DRAWING.



- This section may be utilized to conduct measurements of continuity on UST systems that are protected by cathodic protection systems.
- When conducting a fixed cell - moving ground survey, the reference electrode must be placed in the soil at a remote location and left undisturbed.
- Conduct point-to-point test between any two structures for which the fixed cell - moving ground survey is inconclusive or indicates possible isolation.
- For impressed current systems, the protected structure must be continuous with all other protected structures in order to pass the continuity survey.
- For galvanic systems, the structure that is to be protected must be isolated from any other metallic structure in order to pass the continuity survey.

FACILITY NAME: USP [illegible]PO

NOTE: The survey is not complete unless all applicable parts of sections I-XIV are also completed.

DESCRIBE LOCATION OF "FIXED REMOTE" REFERENCE ELECTRODE PLACEMENT: POINT TO POINT METHOD WAS USED

STRUCTURE "A" [1]	STRUCTURE "B" [2]	STRUCTURE "A" [3] FIXED VOLTAGE (mV)	STRUCTURE "B" [4] FIXED VOLTAGE (mV)	POINT-TO-POINT [5] VOLTAGE DIFFERENCE	ISOLATED/ [6] CONTINUOUS
RECTIFIER GROUND	REG 1 FILL			0 MV	CONTINUOUS
RECTIFIER GROUND	REG 1 TANK MONITOR RISER			0 MV	CONTINUOUS
RECTIFIER GROUND	REG 2 FILL			0 MV	CONTINUOUS
RECTIFIER GROUND	REG 2 TANK MONITOR RISER			0 MV	CONTINUOUS
RECTIFIER GROUND	REG 2 STP			0 MV	CONTINUOUS
RECTIFIER GROUND	SUPER FILL			0 MV	CONTINUOUS
RECTIFIER GROUND	SUPER TANK MONITOR RISER			0 MV	CONTINUOUS
RECTIFIER GROUND	SUPER STP			0 MV	CONTINUOUS
RECTIFIER GROUND	DIESEL FILL			0 MV	CONTINUOUS
RECTIFIER GROUND	DIESEL TANK MONITOR RISER			0 MV	CONTINUOUS
RECTIFIER GROUND	DIESEL STP			0 MV	CONTINUOUS
RECTIFIER GROUND	MPD 1 FLEXES			0 MV	CONTINUOUS
RECTIFIER GROUND	MPD 2 FLEXES			0 MV	CONTINUOUS

1. Describe the protected structure ("A") that you are attempting to demonstrate is continuous (e.g. plus tank bottom).
2. Describe the "other" protected structure ("B") that you are attempting to demonstrate is continuous (e.g. plus steel product line @ STP).
3. Record the fixed remote instant off structure-to-soil potential of the protected structure ("A") in millivolts (e.g. -915 mV).
4. Record the fixed remote instant off structure-to-soil potential of the "other" protected structure ("B") in millivolts (e.g. -808 mV).
5. Record the voltage difference observed between structure "A" and structure "B" when conducting "point-to-point" testing (e.g. 1mV).
6. Document whether the test (fixed cell and/or point-to-point) indicated the protected structure was isolated, continuous or inconclusive.

TRANSMISSION VERIFICATION REPORT

This section may be utilized to conduct a survey of the cathodic protection system by obtaining structure-to-soil potential measurements.

- For Impressed Current systems: the reference electrode must be placed (minimum of [illegible] locations) in the soil directly above the structure that is being tested [illegible] far away from any active anode as practical to obtain a valid structure-to-soil potential (refer to the VADEQ cathodic protection evaluation guidance document for detailed discussion of electrode placement).
- Both "on" and "instant off" potentials must be measured for each structure that is intended to be under cathodic protection.
- The "instant off" potential must be -850 mV or more negative or the 100 mV polarization criterion must be satisfied in order to pass.

- For Galvanic systems: the reference electrode must be placed (minimum of three locations) with at least one local and at least one placed remotely [illegible] feet away from the structure.
- Both the local and remote voltage must be -850 mV or more negative, in order for the structure to pass.
- Inconclusive is indicated when both the local and remote structure-to-soil potentials do not result in the same outcome (both must "pass" or both "fail").
- As a place to record the "galvanic CP system voltage", use the "Instant Off Voltage" sixth column below.

FACILITY NAME: USF NJPO

NOTE: This survey is not complete unless all applicable parts of sections I – XIV are also completed.

LOCATION[1] CODE	STRUCTURE[2]	CONTACT POINT[3]	REFERENCE CELL PLACEMENT[4]	ON[5] VOLTAGE	INSTANT[6] OFF VOLTAGE	100 mV polarization ENDING[7] VOLTAGE	100 mV polarization VOLTAGE[8] CHANGE	PASS/[9] FAIL
	REG 1 TANK	FILL RISER	SOIL AT FILL END	-1391	-1011			PASS
	REG 1 TANK	FILL RISER	SOIL AT TANK CENTER	-881	-864			PASS
	REG 1 TANK	FILL RISER	SOIL AT OPPOSITE END	-952	-914			PASS
	REG 2 TANK	FILL RISER	SOIL AT FILL END	-1733	-1089			PASS
	REG 2 TANK	FILL RISER	SOIL AT TANK CENTER	-957	-891			PASS
	REG 2 TANK	FILL RISER	SOIL AT OPPOSITE END	-1239	-942			PASS
	SUPER TANK	FILL RISER	SOIL AT FILL END	-1897	-1037			PASS
	SUPER TANK	FILL RISER	SOIL AT TANK CENTER	-1012	-939			PASS
	SUPER TANK	FILL RISER	SOIL AT OPPOSITE END	-1542	-966			PASS
	DIESEL TANK	FILL RISER	SOIL AT FILL END	-1766	-1026			PASS
	DIESEL TANK	FILL RISER	SOIL AT TANK CENTER	-1210	-973			PASS
	DIESEL TANK	FILL RISER	SOIL AT OPPOSITE END	-1482	-981			PASS
	MPD 1 FLEXES	FLEXES	SOIL AT MPD	-1478	-1235			PASS
	MPD 2 FLEXES	FLEXES	SOIL AT MPD	-1368	-1194			PASS

COMMENTS: ALL TANKS AND FLEXES WILL MEET CRITERIA.

1. Designate numerically or by code on the site drawing each local reference electrode placement (e.g. 1,2,3... T-1, T-2, P-1, P-2...etc.).
2. Describe the structure that is being tested (e.g. plus tank; diesel piping; flex connector, etc.).
3. Describe where the structure being tested is contacted by the test lead (e.g. plus tank bottom; diesel piping @ dispenser 7/8; etc.).
4. Describe the exact location where the reference electrode is placed for each measurement (e.g. soil @ regular tank STP manhole; soil @ dispenser 7 etc.)
5. (Applies to all tests) Record the structure-to-soil potential (voltage) observed with the current applied (e.g. -1070 mV).
6. (Applies to all tests) Record the structure to soil potential (voltage) observed when the current is interrupted (e.g. 880 mV).
7. (Applies to 100 mV polarization test only) Record the voltage observed at the end of the test period (e.g. 675 mV).
8. (Applies to 100 mV polarization test only) Subtract the final voltage from the instant off voltage (e.g. 880 mV – 675 mV = 105 mV).
9. Indicate if the tested structure passed or failed one of the two acceptable criteria (850 instant off or 100 mV polarization) based on your interpretation of data.

COMMONWEALTH OF VIRGINIA
IMPRESSED CURRENT CATHODIC PROTECTION SYSTEM
60 DAY RECORD OF RECTIFIER OPERATION

- This form may be utilized to document that the cathodic protection system rectifier is checked for operation at least once every 60 days.
- Checked for operation is taken to mean that it was confirmed the rectifier was receiving power and is "turned-on".
- Any significant variance should be reported to the corrosion professional so that any repairs and/or adjustments necessary can be made.

NAME: USP-NJPO		NAME: USP-NJPO	ID #
ADDRESS: 5703 HOLLAND RD.		ADDRESS: 5703 HOLLAND RD.	
CITY: SUFFOLK	STATE: VA	CITY: SUFFOLK	COUNTY:

Rectifier Manufacturer: ILIC	Rated DC Output: 40 VOLTS 8 AMPS
Rectifier Model: WS-SA-40-8-CMPTW	Rectifier Serial Number: 99C303
What is the 'as designed' or lastly recommended rectifier output? _____ VOLTS _____ AMPS	

DATE INSPECTED	RECTIFIER TURNED ON?	TAP SETTINGS		DC OUTPUT		HOUR METER	INSPECTOR INITIALS	COMMENTS
		COARSE	FINE	VOLTS	AMPS			
11/16/11	Y	B	2	16.06	2.74		TH	SUPERIOR SERVICES

CY 1534

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY PROGRAMS

P.O.BOX 10009 Richmond, VA 23240-0009

Subject: GUIDANCE DOCUMENT 01-2024, Amendment #1

Clarification of Statistical Inventory Reconciliation (SIR) Release Detection Guidance for Underground Storage Tanks

To: Regional Directors

From: Ellen Gilinsky, Ph.D., Director Ellen Gilinsky

Date: July 26, 2005

Copies: Regional Storage Tank Program Managers, Fred Cunningham, John Giese, Russ Ellison, James Barnett

Summary:

Section 2.1.1.1 of the Virginia DEQ Storage Tank Program Technical Manual, Third Edition, October 4, 2001 is being amended by this guidance to clarify the language on Statistical Inventory Reconciliation (SIR). SIR is an allowable option of release detection under the Virginia regulation entitled Underground Storage Tanks: Technical Standards and Corrective Action Requirements 9 VAC 25-580. However, the existing SIR language can be interpreted such that a SIR result of failure would in certain instances not require reporting as a suspected release. This guidance clarifies that a SIR failure result is to be reported as a suspected UST release in all instances. The next version of the Manual will contain this amended section.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov/.

Contact information:

Please contact Russell P. Ellison at (804) 698-4269 or email: rpellison@deq.virginia.gov should you have any questions concerning this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Statistical Inventory Reconciliation (SIR) Guidance for Underground Storage Tanks - Supersedes Section 2.1.1.1 of the Virginia DEQ Storage Tank Program Technical Manual, Third Edition, October 4, 2001

Releases Suspected by Statistical Inventory Reconciliation

Statistical inventory reconciliation (SIR) is a method that tank owners and operators may use to meet the release detection requirements of the UST Technical Regulation. SIR is considered an "other method" of release detection, not a type of inventory control (§ 160.H). Failed SIR results, like all other non-inventory control release detection methods that indicate a release must be reported to DEQ within 24 hours unless a monitoring device is found to be defective, repaired, replaced, or re-calibrated immediately, and additional monitoring does not confirm the initial result (§ 190.3.a). After a suspected release is reported, the tank owner/operator must: (1) begin release investigation and confirmation to determine if a release has occurred; and (2) submit a release investigation report to DEQ.

An "inconclusive" SIR result means that the attempt to perform release detection for the tank during that month failed to meet regulatory requirements. The tank owner must immediately investigate to determine the cause of the inconclusive result and immediately correct the situation as described below.

Vendors performing SIR sometimes attribute inconclusive SIR results to improper stick readings. SIR results that were inconclusive because of persons using incorrect procedures to collect data do not have to be reported to DEQ the first month that the test was inconclusive. Tank owners/operators are expected to use appropriate data collection techniques and take corrective measures to prevent the further use of erroneous data collection procedures. If SIR results for the following month are inconclusive, the tank owner/operator must report a suspected release to DEQ.

Upon receiving the first "inconclusive" SIR result, the tank owner/operator must: (1) immediately consult their SIR vendor to assess the possible causes for the inconclusive test result; and (2) make the changes recommended by the SIR vendor (i.e., change sticking practices, calibrate meters, etc.) to reduce the possibility of having future inconclusive SIR results. The DEQ Storage Tank Program will, as a matter of practice, require tank owners/operators to perform a release investigation to determine if the tank is leaking when:

1. SIR results for two consecutive months are inconclusive; or

2. There are three inconclusive SIR results during any six month period.

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, in accordance with the procedures set forth in the Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, dated August 11, 2014, I filed electronically one copy of the attached Complainant's Motion to File Supplemental Prehearing Exchange, Docket No. RCRA-03-2013-0039, for service to:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. EPA, Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

The Hon. Christine D. Coughlin
Administrative Law Judge
U.S. EPA Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

I further certify that on the date set forth below, I served via e-mail and first class mail a true and correct copy of the foregoing to:

Jeffrey Leiter, Esq.
Counsel for Respondents
Leiter & Cramer, PLLC
1707 L Street, NW, Ste. 560
Washington, DC 20036
Email: jll@leitercramer.com

12/10/2015
Date

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