

STATE ENVIRONMENTAL REGULATION

Expert Analysis

DEC Proposing Changes to Rules Affecting Bulk Storage Facilities

The New York State Department of Environmental Conservation (DEC) has proposed changes to update and consolidate its petroleum bulk storage (PBS) and chemical bulk storage (CBS) regulations that will, if adopted, affect as many as 40,000 facilities in the state.¹

The proposed regulations are intended to consolidate and update existing bulk storage rules to reflect changes to state and federal environmental laws. According to the DEC, the proposed changes will make compliance easier and less expensive. Whether these new rules live up to this promise will be tested during their implementation.

Background

The New York Legislature first enacted legislation governing PBS and CBS in 1983, when it enacted Article 17, Title 10, of the Environmental Conservation Law (ECL), titled “Control of the Bulk Storage of Petroleum.” The law applies both to underground storage tanks (USTs) and above-ground storage tanks storing petroleum.

Two years later, in 1985, the DEC promulgated PBS regulations that

By
Charlotte A. Biblow



require owners to register storage facilities with the DEC and to comply with requirements for the safe storage and handling of petroleum.² These regulations have not been substantively revised since then.

The DEC’s regulations also govern “used oil” management. These rules stem from ECL Articles 23 and 27; the former allows the DEC to implement regulations governing used oil collectors, re-refiners, and retention facilities, and the latter governs the operation of solid waste management and hazardous waste management facilities. ECL §27-0900 mandates that the state’s hazardous waste management regulations must be at least as stringent as those established by the federal Environmental Protection Agency (EPA) under the federal Resource Conservation and Recovery Act (RCRA). The DEC, however, can enact used oil management rules that are more stringent than those adopted by the EPA.

In 1986, the state Legislature enacted two laws addressing

chemical bulk storage. ECL Article 37 requires the DEC to regulate all hazardous substances covered by the federal Comprehensive Environmental Response, Compensation and Liability Act, the federal Insecticide, Fungicide and Rodenticide Act, and the federal Toxic Substances Control Act. Article 37 permitted the DEC to regulate other hazardous chemicals not covered by these federal acts, similar to the broader reach given to DEC in the used oil management field.

The second law enacted in 1986, ECL Article 40, titled “Hazardous Substances Bulk Storage Act,” regulated the storage and handling of hazardous substances. Pursuant to the authority given to it in these two laws, the DEC promulgated CBS regulations³ in 1994, setting forth requirements for the safe handling and storage of over 1,000 hazardous substances.⁴

The federal government also has sought to regulate the bulk storage of petroleum and chemicals. In 1984, one year after ECL Article 17 was adopted, Congress added Subtitle I to RCRA. This statute required the EPA to regulate USTs storing certain forms of petroleum (mostly motor fuels) and hazardous substances. In 1988 (three years after the DEC enacted its PBS regulations), the EPA adopted UST regulations⁵ estab-

CHARLOTTE A. BIBLOW is a partner at Farrell Fritz, and can be reached at cbiblow@farrellfritz.com.

lishing the federal program for the monitoring and upgrading of USTs.⁶

The EPA regulations differ from New York's regulations in the following respects:

- The federal regulations define petroleum differently than the DEC's regulations and provide an exemption for certain tanks storing heating oil used for on-premises consumption and certain tanks storing motor fuels at farms and residences;
- The federal regulations cover underground tanks over 110 gallons in capacity, where New York's rules apply to facilities with over 1,100 gallons in capacity;
- The UST leak detection requirements differ;
- The federal regulations required USTs to be upgraded by Dec. 22, 1998, to satisfy leak detection and corrosion protection requirements; and
- Site assessments must be performed when a tank is permanently taken out of service.

In 2005, Congress passed the Energy Policy Act. This wide-reaching federal law required training for facility operators, prohibited delivery of petroleum and chemicals to tanks that are leaking, may be leaking, or are being operated in significant non-compliance, and required "secondary containment" for piping and dispensers. In 2008, the New York Legislature amended the ECL to enable the DEC to enact regulations that would be consistent with the federal Energy Policy Act. New York's 2008 revisions to the ECL included:

- Changing the definition of petroleum to be consistent with the federal definition;
- Incorporating operator training requirements;
- Incorporating the prohibition regarding deliveries of petroleum

and chemicals to leaking or non-compliant tanks;

- Changing the definition of "facility" to include the property or contiguous or adjacent properties used for a common purpose on which is located (i) one or more stationary tanks that singularly or in combination store more than 1,100 gallons, or (ii) any UST whose capacity is greater than 110 gallons;
- Reducing the threshold for regulating USTs to the federal threshold of tanks with greater than 110-gallon capacity; and
- Incorporating requirements for secondary containment.⁷

The proposed regulations are intended to consolidate and update existing bulk storage rules to reflect changes to state and federal environmental laws.

The DEC, in response to the 2008 changes to the ECL, and the EPA, in response to the 2005 Energy Policy Act, drafted proposed regulations to implement the requirements in these statutes. In November 2011, the EPA proposed revisions to its 1988 UST regulations⁸ to increase the emphasis on properly operating and maintaining UST equipment. The EPA closed the public comment period on April 16, 2012, but the revisions have not yet been finalized. Among other things, the EPA's proposal would:

- Add secondary containment requirements for new and replaced tanks and piping;
- Add operator training requirements for UST system owners and operators;
- Add periodic operation and maintenance requirements for UST systems;

- Add new release prevention and detection technologies; and
- Update codes of practice.

The DEC initially released its proposed regulations in August 2013 for informal comment. In response to the comments it received, the DEC modified the proposed regulations and, in August 2014, provided for a 90-day comment period on the revised proposed version, which ends Nov. 4, 2014.⁹

DEC's Proposed Changes

In its press release accompanying the August 2014 proposed revised regulations,¹⁰ the DEC indicated that it had several goals. The first goal was to incorporate the changes made to state and federal laws, singling out tank operator training and prohibition of petroleum and hazardous substances deliveries to leaking or non-compliant tank systems as two of the main changes sought to be addressed. The second goal was to consolidate the PBS, CBS, and federal UST requirements into one set of regulations. The third goal was to make the PBS regulations more consistent with federal regulations, in particular the definition provisions and the structure of the regulations.

The DEC is proposing to repeal 6 NYCRR Parts 612-614 and replace them with a new Part 613 that would regulate the handling and storage of petroleum products pursuant to ECL Article 17, Title 10.¹¹ The new Part 613 (Petroleum Bulk Storage) would, among other things, consolidate existing state and federal regulations for USTs to simplify compliance, add operator training, prohibit deliveries to leaking or non-compliant tanks, and add secondary containment requirements for piping and dispensers.

The DEC also has proposed changes to its used oil management regulations. A cross-reference to Part

613 would be added to 6 NYCRR Subpart 374-2, which also would be updated to be consistent with current federal requirements. Subpart 374-2 would be amended to include used oil acceptance requirements for service and retail establishments that would necessitate the establishments to provide alternate containers or tanks for storing used oil from household do-it-yourselfer oil changers if the establishments were not permitted to use their own used oil tanks for this purpose. In addition, the DEC has proposed to amend 6 NYCRR 370.1(e)(2)(vi) to make it consistent with the federal used oil regulations.¹²

Similarly, the proposed changes to the CBS regulations include consolidating state and federal requirements, adding operator training requirements, and prohibiting deliveries of hazardous substances to leaking or non-compliant tanks. In particular, the DEC is proposing to repeal 6 NYCRR Part 595 (Releases of Hazardous Substances) and place the requirements of that section into 6 NYCRR Parts 597 and 598. It also would repeal the current version of 6 NYCRR Part 596 (Hazardous Substances Bulk Storage Regulations) and replace it with a new Part 596 (Hazardous Substance Bulk Storage Facility Registration). Current Part 597 (List of Hazardous Substances) would be replaced with a new Part 597 (Hazardous Substance Identification, Release Prohibition and Release Reporting). The DEC also would amend Part 598 (Handling and Storage of Hazardous Substances) and rename Part 599 (to Standards for New Hazardous Substance Tank Systems).

The DEC's proposed operator training policy¹³ provides guidance for training UST operators at PBS and CBS facilities in New York. The proposal refers to "Class A Operators," "Class B Operators,"

and "Class C Operators." A Class A operator is an individual who has primary responsibility for the operation and maintenance of a UST system; a Class B operator is an individual who has day-to-day responsibility for implementing the applicable requirements; and a Class C operator is an employee having primary responsibility for addressing emergencies presented by a spill or release from a UST system who has been trained and tested under the direction of an authorized Class A or Class B operator with respect to how to respond to emergencies and alarms caused by spills and releases.

The proposed changes to the chemical bulk storage regulations include consolidating state and federal requirements, adding operator training requirements, and prohibiting deliveries of hazardous substances to leaking or non-compliant tanks.

Class A operators and Class B operators must pass an exam administered by the DEC or must obtain an operator training credential issued by any other state government or a local government within New York that administers an exam acceptable to the DEC. Once an operator has passed an exam, the operator will be recognized as an authorized Class A, Class B, or combination Class A/B operator.

The exam is supposed to emphasize tank system basics, overfill prevention, tank leak detection, piping leak detection, corrosion protection and related testing, spill containment, UST system record-keeping, and operation and maintenance. It also would cover tank registration,

financial responsibility, temporary/permanent tank closure, inventory control, dispensers, spill reporting and response actions, product and equipment compatibility, and training of Class C operators.

Once authorized, a Class A, Class B, or combination Class A/B operator would not be required to be re-authorized or replaced unless the DEC found "significant non-compliance" (SNC) at one or more of the operator's facilities. SNC includes a tank system that is not properly equipped with corrosion protection, spill prevention, overfill prevention, or leak detection. Improper monitoring of tank contents also falls within SNC.

Conclusion

The DEC expects to enact the final rules at the earliest in late Spring 2015 or at the latest by October 2015. This will not completely end the process, however. The DEC has indicated that a second phase of rulemaking will commence after the EPA finalizes its changes to 40 CFR Part 280. When that will occur is uncertain. In the interim, the 40,000 facilities will be dealing with implementing Phase I of these regulations.

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1. See, "Proposed Regulations: Bulk Storage of Petroleum and Chemicals; Management of Used Oil," available at <http://www.dec.ny.gov/regulations/98151.html>.

2. 6 NYCRR Parts 612-614.

3. 6 NYCRR Parts 595-599.

4. The list of regulated hazardous substances is set forth in 6 NYCRR Part 597.

5. 40 CFR Parts 280 and 281.

6. The DEC has been implementing the federal requirements under an agreement with EPA.

7. See, "Changes To The Petroleum Bulk Storage Program," available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/tb2009.pdf.

8. 40 CFR Part 280.

9. See, "DEC Proposes Updates to Petroleum, Used Oil and Chemical Storage Regulations," available at <http://www.dec.ny.gov/press/98327.html>.

10. *Id.*

11. See, "Proposed Revisions to Regulations: Bulk Storage of Petroleum and Chemicals; Management of Used Oil," available at <http://www.dec.ny.gov/chemical/92526.html>.

12. 40 CFR Part 279.

13. See, "DER-40/Operator Training," available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der40.pdf.