

### 2024 Environmental and Energy Law Forecast

#### DELAWARE

##### **DNREC's Amended Storage Tank Regulations Take Effect, Incorporating by Reference Critical Corrective Action Requirements**

***Stephen D. Daly, Esq. and Richmond L. Williams, Esq.***

In December 2023, the Delaware Department of Natural Resources and Environmental Control (DNREC) issued two Secretary's Orders amending DNREC's Underground Storage Tank regulations and Aboveground Storage Tank regulations, respectively. See [Secretary's Order No 2023-WH-032 Approving final regulations to Amend 7 DE Admin. Code 1351: Underground Storage Tank Systems \(USTS\)](#); [Secretary's Order No: 2023-WH-0033 — Approving Final Regulations to Amend 7 DE Admin. Code 1352 relating to Aboveground Storage Tanks \(ASTs\)](#). The amended regulations, which are substantially similar to one another, became effective Jan. 11, 2024 and make enforceable certain procedures relating to DNREC's corrective action protocols.

The principal aim of the amended regulations is to incorporate by reference the Delaware Risk Based Corrective Action Protocol (DERBCAP) (Volume 2, Jan. 2023), for investigating and remediating releases from storage tanks. DNREC had previously used DERBCAP (Volume 1, Jan. 2000, and Volume 2, Jan. 2023) as guidance for soil screening and cleanup measures, but the content of the document was not enforceable through regulatory authority. The amended regulations change that by giving DERBCAP the force of regulation. In addition, DNREC adopted and incorporated by reference the Hydrogeologic Investigation Guidance (Volume 2, January 2023) and the Investigation, Risk Determination and Remediation Guidance for Vapor Intrusion Pathway guidance, dated January 2023. Reports and site evaluations created per these protocols must be kept in the owner/operators' permanent records.

The amended regulations include additional changes. The underground storage tank regulations include a new Part A, Section 15, Repair, Retrofit and Upgrade Requirements for UST Systems. The regulations also include a new Part A, Section 16, Change in Service Requirement and Requirements for Empty UST Systems and a new Part A, Section 18 Removal or Closure in Place Requirements for UST Systems. They replace parallel provisions that were contained in Part B. The amended aboveground storage tank regulations, among other clarifications, include revision of the definition of aboveground storage tank to define each component in a larger tank as a separate tank.

We recommend that owners or operators of underground or aboveground storage tank systems in Delaware review the new regulations, including the new documents incorporated by reference, to determine if any of the changes affect their operations. It is especially important that the regulated community ensures that it has ready access to Volume 2 of DERBCAP (Jan. 2023) and monitors any future

proposed changes or additions to this and the other documents incorporated by reference in the regulations. Older versions of DERBCAP and the Hydrogeologic Investigation Guidance are still readily available on DNREC's website and should not be confused with the versions explicitly incorporated by reference in the amended regulations.

## **Delaware Adopts California's Zero Emission Vehicle Standards Through 2032, Avoiding Complete Phase Out of Sale of Certain Gasoline and Diesel-Powered Vehicles**

***Stephen D. Daly, Esq. and Richmond L. Williams, Esq.***

As reported in [last year's forecast](#), Delaware had initiated the regulatory development process to adopt California's zero-emission vehicle standards, known as "Advanced Clean Car II" (ACC II), under the Clean Air Act. On December 1, 2023, DNREC published its final regulation adopting the ACC II program effective through 2032. This program is designed to reduce criteria pollutant and greenhouse gas emissions from light and medium duty vehicles. According to DNREC, the regulations require automakers to deliver an increasing number of zero-emission vehicles (ZEVs) for sale in Delaware. Starting with model year 2027, 43 percent of new cars and trucks sent to Delaware for sale will be ZEVs. The percent increases to 82 percent in 2032. DNREC proposes that the regulations will expire in model year 2033.

The final regulation was the result of an extensive public comment process. A public hearing was held on April 26, 2023, with over 250 virtual attendees. DNREC also received 2,469 written public comments. Public commenters raised concerns about limiting consumer choice of vehicle, affordability of ZEVs, fueling infrastructure, environmental justice, and access to ZEV charging stations.

In his Order approving the final regulation, DNREC Secretary Shawn Garvin acknowledged the concerns of the public commenters but responded that the phase out of sales of light and medium-duty gasoline and diesel-powered cars in favor of ZEVs would occur gradually. Nevertheless, the final regulation differed from the proposed regulation in that the final rule adopts the ACC II program only through 2032, thereby avoiding the requirement in California's ACC II requiring that ZEVs become 100 percent of new vehicles sales by 2035. While a state like Delaware that chooses to adopt California's mobile source emission standards under the Clean Air Act cannot adopt different standards from California, DNREC has taken the position that it need not adopt the entire phase out contemplated by the ACC II program, although whether this is consistent with the Clean Air Act is a potential open issue.

The Secretary further explained in his Order that there are federal tax credits and rebates available for ZEV purchases, including a rebate of up to \$2500 from DNREC. Further, with significant federal funding through the Bipartisan Infrastructure Bill and the Inflation Reduction Act, Delaware is actively working to expand charging infrastructure to support ZEV use in the state, with a special interest in serving rural communities, disadvantaged communities, and those who live in multi-unit dwellings.

## **Updated DNREC PFAS Guidance in Effect**

***Stephen D. Daly, Esq. and Richmond L. Williams, Esq.***

This past year, the Delaware Department of Natural Resources and Environmental Control (DNREC) adopted a new informal policy document with potential wide-ranging impacts to the regulated community in

the area of PFAS. Specifically, DNREC formally issued a comprehensive update to its Policy for Sampling and Evaluation of Per- and Poly- Fluoroalkyl Substances (PFAS) in Soil, Groundwater, and Surface Water (the PFAS Policy) on July 2, 2023. This updated a policy that was issued in July 2018. The PFAS Policy was not adopted as a regulation pursuant to Delaware's Administrative Procedures Act, and therefore, not subject to the same level of public input and comment required under that law. Nevertheless, the PFAS Policy is expected to be used by DNREC in administering its HSCA regulatory program.

According to DNREC, the PFAS Policy is intended to establish uniform investigation and risk assessment procedures for PFAS cleanups under Delaware's Hazardous Substance Cleanup Act (HSCA) so that they are completed in a consistent and verifiable fashion. In support of the PFAS Policy, DNREC also prepared a [Question-and-Answer Document \(Q&A Document\)](#) that provides additional insight into the purpose of the PFAS Policy and some of the information provided therein.

The PFAS Policy specifically applies to PFAS substances that are identified in the HSCA screening level table, also found on [DNREC's webpage](#). However, please note that there are more than twice as many PFAS analytes identified in Table 2 of the PFAS Policy than there are in the screening level table, as of November 2023. In other words, the PFAS Policy purports to require the analysis of compounds that are not used for screening under HSCA and that, therefore, are not designated hazardous substances under HSCA. However, DNREC separately explained in the Q&A Document that the PFAS Policy applies only "to PFAS that are classified as hazardous substances under HSCA." A wider class of PFAS chemicals were included in the PFAS Policy simply "for expedience," though DNREC encourages regulated parties to sample for and report additional PFAS beyond those listed as hazardous as it might "save time and money" "if additional PFAS compounds become hazardous substances under HSCA," according to the Q&A Document.

This is a potential major source of confusion for the regulated community. Given that both the PFAS Policy includes non-hazardous PFAS, and DNREC is encouraging the voluntary sampling for and reporting of non-hazardous PFAS, any purported application of the PFAS Policy by DNREC, an environmental consultant, or others will need to be closely monitored by the regulated community.

---

Please feel free to forward this information to your colleagues and encourage them to subscribe to our mailing list.

This alert is intended as information for clients and other interested parties. It is not intended as legal advice. Readers should not act upon the information contained herein without individual legal counsel.

Portions of this email may contain attorney advertising under the rules of some states.

Copyright © 2024. Manko, Gold, Katcher & Fox, LLP [www.mankogold.com](http://www.mankogold.com)