

REVISED REGULATORY IMPACT STATEMENT

Repeal of:

6 NYCRR Part 612, Registration of Petroleum Storage Facilities
6 NYCRR Part 613, Handling and Storage of Petroleum
6 NYCRR Part 614, Standards for New and Substantially Modified Petroleum Storage Facilities

Addition of:

6 NYCRR Part 613, Petroleum Bulk Storage

Amendments to:

6 NYCRR section 370.1(e)(2), Hazardous Waste Management System – General
6 NYCRR Subpart 374-2, Standards for the Management of Used Oil

1. STATUTORY AUTHORITY

Petroleum Bulk Storage

Introduction

The State law authority that empowers the New York State Department of Environmental Conservation (Department) to regulate the storage and handling of petroleum is found in two sets of statutes. The first set of statutes is found in Article 12 of the Navigation Law (NL), sections 170 through 197, entitled “Oil Spill Prevention, Control, and Compensation” (Article 12). Article 12 was enacted in 1977 and focused primarily on establishing liability for petroleum discharges or releases and the licensing of very large bulk storage facilities. The second set of statutes is found in Title 10 of Article 17 of the Environmental Conservation Law (ECL), sections 17-1001 through 17-1017, entitled “Control of the Bulk Storage of Petroleum” (Title 10). Title 10 was enacted in 1983 and included requirements that extended regulation to relatively small and mostly commercial bulk storage facilities. The Department’s regulations promulgated on the basis of these laws are found at 6 NYCRR Parts 610 through 614 and cover, in pertinent part, the storage and handling of petroleum at facilities that use underground storage tank (UST) systems and aboveground storage tank (AST) systems.

With the passage of Article 12 and Title 10, the State Legislature preceded Congress's enactment, during 1984, of a statutory framework aimed at regulating some of the same types of facilities. The federal laws, found at Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 USC sections 6991 through 6991m, entitled "Regulation of Underground Storage Tanks" (Subtitle I), are, as the title indicates, limited to UST systems.

General Authority to Regulate Sources of Land and Water Pollution

ECL section 1-0101 declares it to be the policy of the State to conserve, improve, and protect its natural resources and environment, and control water and land pollution in order to enhance the health, safety, and welfare of the people of the State and their overall economic and social well-being. Section 1-0101 further expresses, among other things, that it is the policy of the State to coordinate the State's environmental plans, functions, powers, and programs with those of the federal government and other public and private organizations to the end that the State may fulfill its responsibility as trustee of the environment for present and future generations.

ECL section 3-0301 provides that it shall be the responsibility of the Department to carry out the environmental policy of the State. In furtherance of that mandate, ECL section 3-0301(1)(a) gives the Department authority to "[c]oordinate and develop policies, planning and programs related to the environment of the state and regions thereof" ECL section 3-0301(1)(b) directs the Department to promote and coordinate management of, among other things, water and land resources "to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the State and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order, permit, certification or other similar action or promulgating any rule or regulation, standard or criterion." Pursuant to ECL section 3-0301(1)(m), the

Department is empowered to “[p]revent pollution through the regulation of the storage, handling and transport of . . . liquids . . . which may cause or contribute to pollution.” ECL section 3-0301(2)(a) permits the Department to adopt rules and regulations to carry out the purposes and provisions of the ECL. ECL section 3-0301(2)(m) gives the Department authority to “adopt such rules, regulations, and procedures as may be necessary, convenient, or desirable to effectuate the purposes of this chapter.”

ECL section 17-0303(3) permits the Department to “make, amend and repeal rules and regulations for the storage of liquids likely to pollute the waters of the state including, but not limited to, standards for the construction, installation, maintenance, protection and diking of tanks used to store any such liquids and their associated structures, piping, valves, fittings, fixtures and outlets, in conjunction with the promulgation of which, the [Department] shall consider codes and practices of industries concerned with the handling and storage of such liquids and the time required for persons engaged in such industries to conform with such rules and regulations.”

Authority to Regulate PBS Facilities

In Title 10, the Legislature “declare[d] that the lands and waters of New York State constitute an irreplaceable resource upon which is founded the well-being of public health, economic vitality and the state’s environment,” and that these resources may be contaminated by spills of petroleum from PBS facilities (facilities). Petroleum spills are a threat to the public welfare and Title 10 empowers the Department to prevent spills through the establishment of rules governing facilities. See ECL section 17-1001. The standards that the Department must establish include, but are not limited to, requirements governing the design, construction, installation, maintenance, and closure of facilities. Title 10 also specifies that the Department establish certain registration, leak detection, testing and inspection, corrective action, operator

training, and variance requirements. See ECL sections 17-1005, 17-1007, 17-1009, and 17-1015.

Authority Regarding Spill Prohibition, Reporting, and Containment

It is “unlawful for any person . . . to discharge into [waters of the State] organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.” ECL section 17-0501.

All discharges of petroleum that are not pursuant to and in compliance with the conditions of a state or federal permit are prohibited. NL section 173.

Any person responsible for causing a petroleum discharge must immediately notify the Department of the discharge, but in no case later than two hours after the occurrence of the discharge. NL section 175.

Any person who has caused an unauthorized discharge of petroleum must immediately undertake to contain such discharge. NL section 176(1).

The Department and the State Comptroller are authorized to adopt, amend, repeal, and enforce such rules as they deem necessary to accomplish the purposes of Article 12. NL section 191.

Any person who owns, possesses, or controls “more than [1,100] gallons, in bulk, of any liquid, including petroleum, which, if . . . discharged or spilled would or would be likely to pollute the lands or waters of the state . . . shall, as soon as he has knowledge of the . . . discharge or spill of any part of such liquid . . . immediately notify the department.” ECL section 17-1743.

Authority Regarding Access to Facilities’ Premises and Records

The Department is authorized to “[e]nter and inspect any property for the purpose of investigating either actual or suspected sources of pollution or contamination or for the purpose of ascertaining compliance or non-compliance with any law, rule, or regulation” ECL

section 3-0301(2)(g).

Pursuant to ECL section 17-0303(6), the Department has “the right to enter at all reasonable times in or upon any property, public or private, for the purpose of inspecting and investigating conditions relating to pollution, or the possible pollution of any waters of the state”

ECL section 17-1011 mandates that the owner or operator of a facility must, upon reasonable notice from the Department, permit Department personnel at all reasonable times to have access to all records relating to the daily measurement and inventory of petroleum stored at a facility. This section also authorizes Department personnel, at reasonable times and upon reasonable notice, to enter and inspect any facility, provided the Department officer or employee is accompanied by the owner or operator or their designee.

Department personnel are “authorized to enter and inspect any property or premises for the purpose of inspecting facilities and investigating either actual or suspected sources of discharges or violation of [Article 12] or any rule or regulation promulgated pursuant to [Article 12].” Department personnel are “further authorized to enter on property or premises in order to assist in the cleanup or removal of the discharge.” NL section 178.

Authority to Cooperate and Coordinate with Other Government Entities

The Department is empowered to cooperate with the executive, legislative, and planning authorities of the United States in furtherance of the policy set forth in ECL section 1-0101. ECL sections 3-0301(1)(w) and 3-0301.2(d)(3). The Department is to “[a]ct as the official agency of the state in all matters affecting the purposes of the department under any federal laws. . . .” ECL sections 3-0301(2)(j).

The Department has the duty and responsibility to “[c]ooperate with the appropriate agencies of the United States . . . in respect to pollution control matters” ECL section 17-

0303(5)(c).

The Department is authorized to “delegate to municipal health or environmental departments or agencies or other appropriate governmental entities . . . any of which shall meet such qualifications relating to adequate authority, expertise, staff, funding and other matters as may be prescribed, such functions of review, approval of plans, issuance of permits, licenses certificates or approvals required or authorized by this chapter as [the Department] may deem appropriate . . . subject to such conditions as [the Department] may establish.” ECL section 3-0301(2)(p). The Department may withdraw a delegation of power to a municipal entity at any time upon 30 days written notice to the municipal entity. Ibid.

Every local law or ordinance which is inconsistent with the provisions of Title 10 or the Department’s implementing regulations is preempted. However, an inconsistent local law or ordinance issued by a city with a population of 1,000,000 or more or a county, will not be preempted if the local law or ordinance provides environmental protection equal to or greater than the provisions of Title 10 or the Department’s implementing regulations, and the municipality files with the Department a written declaration of its intent to implement the law or ordinance which is approved by the Department in written findings which set forth the terms of approval. ECL section 17-1017.

Federal Authority

The U.S. Environmental Protection Agency (EPA) summarized the development of the pertinent federal statutory and regulatory authority in the following passage:

In 1984, Congress responded to the increasing threat to groundwater posed from leaking USTs by adding Subtitle I to the Solid Waste Disposal Act (SWDA)[more commonly known as the Resource Conservation and Recovery Act (RCRA)]. Subtitle I of SWDA required EPA to develop a comprehensive

regulatory program for USTs storing petroleum or certain hazardous substances, ensuring that the environment and public health are protected from UST releases. In 1986, Congress amended Subtitle I of SWDA and created the Leaking Underground Storage Tank Trust Fund to implement a cleanup program and pay for cleanups at sites where the owner or operator is unknown, unwilling, or unable to respond, or which require emergency action.

In 1988, EPA promulgated the UST regulation (40 CFR part 280), which set minimum standards for new tanks and required owners and operators of existing tanks to upgrade, replace, or close them. In addition, after 1988 owners and operators were required to report and clean up releases from their USTs. The 1988 UST regulation set deadlines for owners and operators to meet those requirements by December 22, 1998. Owners and operators who chose to upgrade or replace had to ensure their UST systems included spill and overflow prevention equipment and were protected from corrosion. In addition, owners and operators were required to monitor their UST systems for releases using release detection (phased in during the 1990s, depending on when their UST systems were installed). Finally, owners and operators were required to have financial responsibility (phased in through 1998), which ensured they have financial resources to pay for cleaning up releases. EPA has not significantly changed the UST regulation since 1988.

In 1988, EPA also promulgated a regulation for state program approval (40 CFR part 281). Since states are the primary implementers of the UST program, EPA established a process where state programs could operate in lieu of the federal program if states met certain requirements and obtained state program approval from EPA. The state program approval regulation describes

minimum requirements states must meet so their programs can be approved and operate in lieu of the federal program.

In 2005, the Energy Policy Act further amended Subtitle I of SWDA. The Energy Policy Act required states receiving Subtitle I money from EPA meet certain requirements. EPA developed grant guidelines for states regarding operator training, inspections, delivery prohibition, secondary containment, financial responsibility for manufacturers and installers, public record, and state compliance reports on government USTs.

80 Fed. Reg. 41566, 41568, 40 CFR Parts 280 and 281, Revising Underground Storage Tank Regulations—Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training; Final Rule (July 15, 2015)[bracketed text added].

The above passage is drawn from the preamble to EPA’s final rule containing revisions to 40 Code of Federal Regulations (CFR) Part 280, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST). EPA’s changes are aimed at complying with the new mandates contained in the Energy Policy Act of 2005 (EPAct) and updating the rule in certain other ways.

Because State statutes and regulations concerning the regulation of PBS preceded their federal counterparts, the State requirements are not entirely consistent with the federal ones. Following the passage of the EPAct amendments to Subtitle I, the State Legislature, in 2008 (see Ch. 334, L. 2008), amended Title 10 to provide the Department with the authority necessary to align the Department’s regulations with the existing federal regulation and the changes foreseen due to the EPAct provisions. These Title 10 amendments changed the definitions of the terms “facility” and “petroleum” (so as to allow the Department to regulate the same type of entities and substances covered by the relevant provisions of 40 CFR Part 280) and expressly authorizes

the Department to establish an operator training program and prohibit petroleum deliveries to certain facilities that are not in compliance with applicable regulations. These specific authorizations empower the Department to implement the key mandates of the EAct that are covered under the newly revised 40 CFR Part 280.

Used Oil Management

Article 3, Title 3; Article 17, Title 10; Article 23, Title 23; Article 27, Titles 7 and 9; Article 70; and Article 71, Titles 27 and 35 of the ECL authorize the proposed changes to 6 NYCRR section 370.1(e)(2) and Subpart 374-2. The Department is authorized to promulgate regulations and standards applicable to the generation, storage, transportation, treatment and disposal of hazardous waste, as necessary to protect public health and the environment. Pursuant to ECL section 27-0900, these regulations and standards must be at least as stringent as those established by EPA under authority of RCRA, Subtitle C (42 USC sections 6921 through 6939e).

2. LEGISLATIVE OBJECTIVES

Petroleum Bulk Storage

The legislative objectives underlying the above-referenced statutory authority are directed toward establishing requirements for the safe storage and handling of liquids, including petroleum, that pose a threat to public health and the environment. These legislative objectives were initially met when the Department promulgated the existing Parts 612 through 614 during 1985. The proposed Part 613 would continue to meet these legislative objectives and reflect the statutory changes that were made to Title 10 in 2008, which allow for consistency with new federal requirements enacted in the EAct.

Adoption of proposed Part 613 would ensure that the environmental and public health protections afforded by the existing Parts 612 through 614 and 40 CFR Part 280 are continued and enhanced.

Used Oil Management

Articles 3, 23 and 27 of the ECL authorize the Department to promote resource recovery and to preserve and enhance the quality of air, water and land resources within the State. Article 23 allows the Department to implement regulations governing used oil collectors, re-refiners and retention facilities, in conformance with Article 27 of the ECL. Article 27 requires the promulgation of regulations governing the operation of solid waste management and hazardous waste management facilities. Pursuant to ECL section 27-0900, the hazardous waste management regulations must be at least as broad and as stringent as those established by EPA under authority of RCRA. Thus, State regulations governing used oil management must be at least as broad and as stringent as the federal regulations. It was also the intent of the Legislature for the Department to adopt into the State's regulations any new and amended federal standards concerning used oil in a timely manner in order to maintain federal authorization of New York State's used oil management program.

3. NEEDS AND BENEFITS

Petroleum Bulk Storage

This rule making is principally aimed at harmonizing the existing State requirements (currently established at 6 NYCRR Parts 612 through 614) with the federal requirements (found at 40 Code of Federal Regulations Parts 280 and 302) so that State and federal regulatory requirements are more consistent. This includes the operator training and delivery prohibition features derived from the EPCRA, which are mandated by the 2008 changes made to Title 10. In

addition, the Department is proposing to incorporate by reference current technology standards and standards of practice for newly installed tank systems and clarify certain existing regulatory requirements. The Department does not intend to establish any new requirements concerning the bulk storage of petroleum that will change the manner in which the subject facilities operate under existing industry practices and applicable federal and State laws and regulations.

The Department has implemented certain aspects of the 40 CFR Part 280 requirements for UST systems pursuant to a 2002 Memorandum of Agreement (MOA) between the Department and EPA. To aid the Department in carrying out its responsibilities under the MOA, EPA annually provides funds to the Department of approximately \$3.9 million. The adoption of this proposed rule to enact the requirements of the EPAct would ensure that the Department continues to receive these funds which are vital to its implementation and enforcement of the State's PBS program.

In addition to various clarifications or corrections to, and overall reorganization of, the requirements embodied in the existing Parts 612 through 614, the proposed Part 613 is intended to increase consistency with overlapping federal requirements. The needs and benefits of specific provisions of proposed Part 613 are discussed below.

Increased Compliance by Subject Facilities

The existing State PBS and federal UST programs are not completely consistent with respect to the terminology used. Those differences would largely be eliminated with the adoption of the proposed Part 613. Many regulated entities with UST systems should find it easier and less expensive to comply with State regulatory requirements because they would be more consistent with federal regulatory requirements. The Department anticipates that this would result in increased compliance.

Facilities that are owned or operated by entities that have facilities in other states may find it easier to understand and comply with the new Part 613 because each subpart within the rule largely follows the structure of 40 CFR Part 280. Whereas New York adopted regulations prior to the adoption of a federal regulatory program, most other states developed their tank regulations after the promulgation of 40 CFR Part 280 and many of them followed, to some extent, the structure of the federal rule. For example, the neighboring states of New Jersey, Pennsylvania, and Connecticut have, to varying extents, patterned their tank rules after 40 CFR Part 280.

Revision of Certain Key Regulatory Definitions

Some definitions that are central to the implementation of the PBS program are clarified or added in the proposed rule. The definition of “UST system” in the proposed rule is essentially equivalent to that found in 40 CFR Part 280. Different classes of operators are defined for the purposes of operator training. The various concepts of tank capacity present in the existing rules are now explicitly defined in the terms “design capacity,” “storage capacity,” and “working capacity.” The statutory definition of “facility” is clarified to exclude operational and temporary tank systems, both of which are separately defined. The term “used for a common purpose” (found in the definition of “facility”) is explicitly defined. The definition of “farm” tracks the definition of “farm tank” found in 40 CFR Part 280 (Title 10 and existing Part 612 lack a definition for “farm”). In order to be consistent with 40 CFR Part 280, the Title 10 definition of “petroleum” is clarified to incorporate the concept of a complex blend of hydrocarbons. The definition of “petroleum mixture” is added to address the issue of petroleum additives (that is, petroleum mixed with hazardous substances) and to clarify the threshold at which the proposed rule would not be applicable. Tank system category terminology is introduced to differentiate between requirements for tank systems of different ages, based on tank installation date. A

Category 1 tank system is a tank system whose tank was installed prior to December 27, 1986 (Category 1 tank systems currently are referred to as “existing tanks” in the rules). A Category 2 tank system is a tank system whose tank was installed during the period from December 27, 1986 through the effective date of the proposed rule (Category 2 tank systems currently are referred to as “new tanks” in the rules). A Category 3 tank system is a tank system whose tank is installed after the effective date of the proposed rule.

Responsibility of Property Owner for Registration

The statutory definition of “owner” is any person who has legal or equitable title to a facility. See ECL section 17-1003(4). Previously, a “facility” was essentially defined to consist of the tank and piping in which petroleum is stored. See former ECL section 17-1003(1). However, with the 2008 amendments to Title 10 of Article 17 of the ECL, the definition of “facility” was changed to mean the property on which a tank and piping are located. See ECL section 17-1003(1). In light of this change, the Department has determined that the property owner, rather than the tank system owner, is now responsible for ensuring that tank systems are registered. This requirement is now reflected in the text of proposed sections 613-1.9(a) and 613-1.3(w). The tank system owner or operator will be responsible for all other aspects of tank system operation. This ensures that the property owner is aware of the tank systems located on the owner’s property. Such awareness is beneficial to the property owner because the property owner may be held liable for spill remediation if the tank system owner and operator abandon the property.

Revision of Classification of Tank Systems (Underground Versus Aboveground)

A tank situated above grade and encased in concrete was previously considered aboveground if there were holes for detecting leaks in the base of the concrete form. However,

this type of tank is not accessible for purposes of performing monthly inspections which are required for all aboveground tank systems. The proposed rule would clarify that a tank situated above grade that cannot be physically inspected is considered an underground tank, which is required to have leak detection. The proposed rule would recognize that holes in the base of a concrete form may be used as a leak detection method.

The text of the proposed rule was revised to amend the definition of “underground storage tank system.” The definition now excludes any tank system where the tank is completely above the surface of the ground and the tank is either fully enclosed within pre-fabricated secondary containment or is insulated in order to store heated petroleum. The Department determined that these tank systems are constructed to AST system standards and it would be impracticable to apply UST system standards to these tank systems.

Addition of “Temporary Tank System” Definition

The regulated community has historically been concerned about tanks intended for temporary use, typically at construction sites, and has desired that such tanks not be regulated. The Department agrees that temporary tank systems do not need to be regulated the same as permanent tank installations. Temporary tank systems are generally smaller than those installed for long-term use and typically only remain on-site for a limited time period. It would also be burdensome for owners to register these tank systems and comply with the requirements of the regulations, as well as for the Department to process registrations for these tank systems. The proposed rule defines “temporary tank system” for the purpose of explicitly exempting these tank systems from regulation. The Department believes that 180 days would allow projects to be completed without being subject to the PBS regulations. Tank systems remaining on-site in excess of 180 days, however, would be considered permanent installations and therefore become subject to the PBS regulations.

Addition of New Exemptions for Regulation

The text of the proposed rule was revised to exempt from regulation any wastewater treatment tank system and any tank system used for emergency spill or overflow containment that is expeditiously emptied after use.

The Department determined that most wastewater treatment tank systems, including oil water separators, are subject to regulation under the federal Clean Water Act and hence further regulation under this rule is unnecessary to protect public health and the environment. As for the wastewater treatment tank systems not subject to the federal Clean Water Act, the Department anticipates that these tank systems will be made subject to Part 613 following the next phase of rule making. The next phase of rule making will be part of the Department's effort to conform Part 613 to the revisions found in the newly revised 40 CFR Part 280.

The Department determined that it is appropriate to exempt tank systems used for emergency spill or overflow containment as long as the tank is expeditiously emptied after use. Regulation of these tank systems is unnecessary because the tank system is rarely used and expeditiously emptied and, therefore, is unlikely to have any long-term leaks.

Revision of the Requirements for the Approval of Local Programs

The existing requirements concerning the approval of local programs are being modified in the proposed rule to include a requirement that every municipality with an existing approved program may, within 180 days after the effective date of the proposed rule, request approval of a new or revised local law or ordinance that would establish a new or revised local program. Failure by a municipality to seek approval of a new or revised local ordinance will result in rescission of the Department's prior approval and cessation of the local program. This modification is being made to ensure that each local program: (1) is consistent with the State

PBS program (including the new operator training and delivery prohibition features) and (2) continues to have resources that are adequate for the proper implementation of the program.

Ensuring Reliance on State of the Art Industry Standards

The existing rules governing the bulk storage of petroleum, Parts 612 through 614, have remained essentially unchanged since their promulgation during 1985. Since that time, there have been many advances in the technologies and practices regarding the bulk storage of petroleum. Many of the existing regulatory requirements no longer achieve the legislative objectives of ensuring the safe handling and storage of petroleum. Many of the old standards established in the existing Parts 612 through 614 are nearly impossible for new tank systems at subject facilities to comply with. For example, existing section 614.3(e)(2) allows new steel tank systems to be cathodically protected with equipment that is designed, fabricated, and installed in accordance with the July 1983 version of sti-P3®, “Specifications for sti-P3® System for External Corrosion Protection of Underground Steel Storage Tanks” issued by Steel Tank Institute. However, no new systems adhere to this standard. Technological progress has resulted in a newer standard supplanting the older one. The Department cannot enforce a regulation that is, in some parts, impossible to comply with because the equipment is no longer produced or the practices have been found to be deficient. Therefore, the proposed rule incorporates by reference current technology standards and standards of practice for newly installed tank systems.

Revision of Requirement for As-built Plans for UST Systems

The requirement for the generation and retention of as-built plans for UST systems has been clarified in the proposed rule to make explicit that owners are required to identify certain equipment at the facility and indicate the general location of the equipment. The Department issued guidance (former DER-25, “Petroleum Bulk Storage Inspection Handbook”) in 2011 that

explained how facilities could cure non-compliance if some of the information was not already included in the as-built plan. Based on concerns raised to the Department by representatives from the regulated community, the Department has reduced the level of information that the Department had previously required in its implementation of the existing requirement found at section 614.7(d) and reflected in former DER-25. In the revised proposed rule, the Department only requires a facility to include a listing of certain attributes of a Category 3 UST system (physical dimensions of the tank, and installation date for each portion of piping installed at a different time than the tank) on an as-built information record; no such information is required to be shown for Category 2 UST systems.

Revision to Inventory Monitoring Requirements

Because tank systems which store motor fuel or kerosene that will not be sold as part of a commercial transaction often do not have dispensers that are calibrated, inventory monitoring is not an effective tool for detecting product losses for these tank systems. Under ECL section 17-1005(1)(b), the Department may exempt from the inventory monitoring requirement tank systems from which no petroleum is sold. Therefore, under proposed section 613-2.3(b)(1)(i) and (ii), the requirement for inventory monitoring as a leak detection method would be limited to tank systems which store any amount of motor fuel or kerosene that will be sold as part of a commercial transaction.

Inclusion of Operator Training Provisions for Operators of Certain UST Systems

Pursuant to the EPCRA, training for operators of USTs regulated under 40 CFR 280 is required. EPA provided the guidelines for developing operator training programs. Under proposed Part 613, operators and tank system owners must designate operators for every UST system or group of UST systems that is subject to the requirements of Subpart 613-2. There

would be three operator classes (A, B and C) to enable training to be focused on the particular level of knowledge required.

Consistent with federal requirements, there would be three key components of the operator training program: training, assessment of knowledge, and verification. Under proposed section 613-2.5, training could be accomplished by any method selected by the operator (self-study, online, or in-person classes). The Department will develop training materials and an examination to allow for operators to demonstrate their understanding of the equipment and practices necessary for the safe operation of UST systems. It is anticipated that the exam would primarily be administered online. The Department recognizes that online testing may not be a viable option for some operators and therefore proposes to provide in-person exam options.

The Department proposes to accept operator training credentials issued by another state with an operator training program acceptable to the Department so that regulated entities which operate in other states would not be required to comply with duplicative training requirements.

Construction Standards for ASTs

The Department has revised the text of the proposed rule to limit the applicability of the tank construction standards established at section 4.1(b)(1)(i) to any AST having a design capacity of 60 gallons or greater. The Department determined that none of the codes of practice governing AST construction listed in the proposed rule have any application to ASTs having a design capacity less than 60 gallons. ASTs having a design capacity of less than 60 gallons are more like mobile containers than tanks and it would impracticable to apply AST construction standards to them. The Department is not aware of any other code of practice that applies to ASTs having a design capacity lower than 60 gallons.

Allowance for Aboveground Tanks to be Constructed of Material Other Than Steel

Former section 614.9(a) requires all aboveground storage tanks to be constructed of steel. The Department reviewed NFPA 30 [2012 edition] and found that, in limited circumstances, a tank constructed of a material other than steel is acceptable. In light of this, the proposed Part 613 would allow the Department to grant approval for tanks to be constructed of material other than steel in circumstances where: (1) the facility is using the tank to store Class IIIB petroleum in areas that would not be exposed to a spill or leak of Class I or Class II petroleum, or (2) the properties of the petroleum stored dictate that storage should be in a tank that is not made of steel.

The Department has revised the proposed rule to explicitly allow, without the issuance of a variance, any AST that stores Class IIIB petroleum to be constructed of a material other than steel if the AST is installed in an area that would not be exposed to a spill or leak of Class I or Class II petroleum. The Department has reviewed section 3404.2.7.1 of the 2010 Fire Code of New York State which states that materials used in tank construction shall be in accordance with NFPA 30. The Department has reviewed paragraph 21.4.1.2 of NFPA 30 (2012 edition) that allows for ASTs to be constructed of a material other than steel and determined that the conditions listed in that paragraph are sufficient for protection of public health and the environment.

Inclusion of Delivery Prohibition Provisions

The new requirements of proposed Subpart 613-5 are included to allow the Department to prohibit deliveries of petroleum to tank systems that are in significant noncompliance with the proposed rule. This subpart would implement the terms of ECL section 17-1007(4) which were added as part of the 2008 amendments to Title 10. The Department would have discretion to not

prohibit deliveries in cases that would jeopardize access to fuel in rural and remote locations and also in cases that would jeopardize public health and safety.

Inclusion of Release Reporting, Corrective Action, and Public Participation Provisions

Release reporting, corrective action, and public participation provisions are included in the proposed rule. These provisions are drawn from 40 CFR section 280.67 and satisfy the requirements of 40 CFR section 281.35(f).

Used Oil Management

The proposed rule incorporates into the State regulations revisions made to federal regulations between July 30, 2003 and April 13, 2012 and would ensure the State maintains authorization of its hazardous waste management program, and continues to receive necessary federal grant monies.

On May 29, 1986, EPA granted New York final base authorization to administer and enforce the Department's July 14, 1985 regulations in lieu of the equivalent federal regulations (51 FR 17737). In order to maintain this authorization, the Department must continually amend the used oil regulations to be consistent with, and at least as stringent as, EPA's amendments to the federal hazardous waste management regulations pursuant to 42 USC section 6929. The amendments to the State regulations which adopt more stringent federal requirements must be made in accordance with the time limits imposed by 40 CFR Part 271. If a deadline is not met, the State risks losing EPA authorization of its hazardous waste management program, as well as substantial federal grant monies.

Most of the Department's used oil regulations are contained in 6 NYCRR Subparts 374-2 and 360-14. Part 613 includes standards for PBS tank systems that are also applicable to tanks storing used oil.

The provisions of section 370.1(e)(2) and Subpart 374-2 are proposed to be revised to address changes to definitions and cross-references related to proposed revisions to Part 613. In addition, revisions are being made to account for changes to 40 CFR Part 279.

EPA's July 30, 2003 rule (68 FR 44659-44665) provides clarifications and corrections on used oil requirements. Clarifications are made with respect to mixtures of used oil and polychlorinated biphenyls and their applicability to the federal Toxic Substances Control Act and its implementing regulations, 40 CFR Part 761. The regulation of mixtures of used oil and hazardous waste from conditionally exempt small quantity generators is also clarified. Changes are also made with respect to the recordkeeping requirements for used oil marketers. These changes should increase the regulated community's understanding of the regulations. To adopt these federal provisions, changes to Subpart 374-2 are being proposed. Changes to Part 371 will be proposed in a separate rule making.

In EPA's June 14, 2005 rule as amended on August 1, 2005 (70 FR 34548-34592, and 70 FR 44150-44151), a variety of testing and monitoring requirements were changed to allow more flexibility when conducting RCRA related sampling and analysis. Testing requirements were updated to make it easier and more cost effective to comply with regulations. Consistent changes are proposed to Subpart 374-2 in this rule making.

EPA's July 14, 2006 rule (71 FR 40254-40280) contains corrections to hazardous waste and used oil regulations, including spelling, printing omissions, typographical errors, and incorrect cross-references. Some of the errors were identified by the Department and corrected in a previous used oil rule making. This rule making does not add any new regulatory requirements. Remaining changes to Subpart 374-2 are being proposed in this rule making.

In addition, typographical errors, clarifications and inconsistencies between State and federal regulations would be corrected along with some modifications to areas where State requirements are different from federal requirements. These State initiatives address

clarifications and improvements to the regulations. Particular changes which are intended to clarify the regulatory intent are discussed below.

Provisions are proposed to be added to the used oil regulations for consistency with Title 23 of ECL Article 23, pertaining to used oil acceptance requirements for “service establishments” and “retail establishments.” Since these provisions are mandated by statute, they must be reflected in the used oil regulations. 6 NYCRR Part 613, which is independently applicable to many used oil tanks, contains provisions that a tank that does not meet certain minimal standards may be “tagged,” and delivery of used oil into the tank prohibited. Subpart 374-2 would be clarified to indicate that if the used oil tank at a service or retail establishment is tagged, the owner or operator must provide alternate container or tank storage to receive used oil from household do-it-yourselfers. Such alternate storage must be designed and operated in compliance with all applicable used oil storage requirements.

There are several reasons why maintaining RCRA authorization and keeping current with the federal regulations is beneficial to the State and the regulated community. New York would continue to have primary responsibility for management of the federal hazardous waste management program and any related compliance and enforcement activities. Less confusion occurs when the regulated community can follow one set of regulations (i.e., New York’s). The State’s management of the hazardous waste regulatory program is more sensitive to local conditions, concerns and needs. In addition, the State would obtain maximum grant support from EPA. Finally, limited state, federal and private resources can be more effectively used to protect public health and the environment when only one set of rules applies.

The Federal Registers referenced in the Summary of Express Terms provide greater detail on the environmental benefits resulting from the federally based proposed changes. The Federal Registers also provide further discussion on areas where revised standards simplify waste

management or encourage recycling while still being protective of public health and the environment.

4. COSTS

Petroleum Bulk Storage

Costs to Regulated Parties

There would be costs incurred by facilities subject to the operator training requirements of proposed section 613-2.5. Within 30 days of being designated, every Class A and B operator must adequately perform on an assessment of knowledge of regulatory requirements applicable to the relevant operator class. Before being designated, every Class C operator must be trained and tested by the Class A or B operator. Operators of heating oil tank systems (and other tank systems that are not regulated under 40 CFR Part 280) are exempt from this requirement. Self-study can be conducted at no cost and training courses are optional. The Department will develop tests for Class A and B operators. The Department will also develop training materials and make them publicly available. There will be no charge for the training materials or for an operator to take the test. Costs for Class A and B operators would be limited to costs associated with the time to prepare and take the test. Retesting or new operator designation would be required within 30 days of a Department determination that the relevant UST system is significantly out of compliance.

The proposed rule would eliminate or reduce costs that are incurred under the existing rules by certain facilities. These cost reductions are attributable to the following features of the proposed rule: (1) the elimination of the requirement to perform inventory monitoring for tank systems which store motor fuel or kerosene that will not be sold; (2) the introduction of a uniform records retention schedule with three time periods (three years, five years, or the life of

the facility) depending upon the record type; and (3) the elimination of periodic tank testing for UST systems that were upgraded in accordance with 40 CFR Part 280.

Costs to the Department, the State, and Local Governments

The Department would incur costs to develop and administer the operator training requirements and to implement the delivery prohibition requirements. Approximately \$5,000 will be needed to procure tags and associated materials to implement the delivery prohibition requirements. The amount of staff time needed to accomplish these tasks cannot be determined until the implementation details have been finalized. This will be accomplished while the rule making process is being completed. The Department would continue to partially cover its personal and non-personal costs through registration application fees. The proposed rule would not impose any additional costs on state agencies or local governments that own or operate facilities.

Used Oil Management

Costs to Regulated Parties

The Department is proposing to adopt the vast majority of EPA's updated regulations without substantive change. The adoption of these proposed amendments would not result in any additional costs to the regulated community. These changes would increase consistency between State regulations and federal regulations. The proposed definitions in Part 613 conform more closely with 40 CFR 280 definitions, allowing corresponding changes to Subpart 374-2 to conform better to the analogous 40 CFR Part 279 definitions. Actual requirements for used oil handlers based upon these revised definitions would stay the same.

EPA's cost analyses of these regulatory amendments noted no added expenses to the regulated community (68 FR 44663 – 44665, 70 FR 34552 -34553, 71 FR 40257).

Costs to the Department, the State, and Local Governments

Implementation of the proposed revisions to the used oil regulations would not result in new costs to the Department. The proposed regulations do not create new regulatory programs, do not expand existing regulatory programs, and do not increase the universe of the regulated community. Conformance with these amendments would not result in additional costs to other State agencies or local governments. No cost savings to the Department are expected.

Cost/benefit analyses were provided in the preambles in the Federal Registers, as noted above, for the rules that the Department is proposing to adopt in this rule making.

5. LOCAL GOVERNMENT MANDATES

No additional recordkeeping, reporting, or other requirements not already created by statute would be imposed on local governments by the proposed rules.

6. PAPERWORK

The proposed rules contain no substantive changes to existing reporting and record keeping requirements for facilities. The proposed rule includes a table that summarizes all PBS program record keeping requirements. The existing record keeping requirements have been simplified by generally limiting the timeframes for record retention to three years, five years, or for the life of the tank system. Facilities would be required to retain records of operator training once the requirement for training goes into effect. In most cases, paperwork may now be submitted and maintained in electronic format.

7. DUPLICATION

Petroleum Bulk Storage

One of the main goals of this rule making is to reduce duplication. The proposed rule represents a harmonization of existing State PBS and federal UST program requirements. The existing State PBS and federal UST programs regulate the same tank systems in somewhat different ways and are not completely consistent with respect to the terminology used. Those differences would be reduced with the promulgation of the new Part 613. New requirements that are in the newly revised federal rule will be incorporated, as appropriate, into Part 613 in a subsequent rule making.

Used Oil Management

The proposed amendments would not result in a duplication of State regulations. Changes to cross-references and definitions would allow the used oil regulations to continue to align with the state petroleum bulk storage regulations. Due to changes to State statute, the PBS regulations are now independently applicable to many used oil tanks. Changes to the used oil regulations are needed to correct cross-references to the PBS regulations and reduce conflicting requirements. The changes in definitions would also result in the State used oil regulations more closely following the federal used oil regulations. By adopting the recent federal regulations, New York would not only retain authorization, but also reduce duplicative State and federal regulation of used oil in the State.

8. ALTERNATIVES

Petroleum Bulk Storage

The Department considered three alternatives in the development of the proposed Part 613. They are: (1) no action, (2) a single-phase revision of all regulatory requirements that

affect PBS, and (3) a two-phase revision of all regulatory requirements that affect PBS. In essence, these alternatives are, respectively, doing nothing, going beyond the present proposal with the imposition of new State initiatives, and going forward with the present proposal. A subsidiary consideration for alternatives 2 and 3 was whether to structure the new regulation based on the existing Parts 612 through 614 or 40 CFR Part 280.

The Department declines to take no action for four interrelated reasons. First, the existing rules should, with respect to new tank systems, be updated to reflect the state of the art technologies and practices for the installation and operation of facilities. Second, the existing rules do not adhere to the 2008 revisions to Title 10, including the implementation of the major changes to Subtitle I enacted through the EPCRA. The major changes were the new requirements for operator training and the authority to prohibit the delivery of petroleum to facilities that are in significant non-compliance with the requirements of the PBS program. Third, compliance by facilities should increase because the Department anticipates that facilities would find it easier and less expensive if they have very similar regulatory programs to follow. Fourth, the Department would not lose crucial federal funding that supports implementation and enforcement of its PBS program. Further explanation of these reasons may be found in the Needs and Benefits section of this document.

The Department's second alternative was to propose a rule that includes more stringent requirements, including a requirement that all existing facilities (Category 1 and Category 2 tank systems in proposed rule) be upgraded to new tank system standards or be closed. For two reasons, the Department has chosen to make changes to its PBS program through two separate rule makings, of which this rule making constitutes the first phase. The reasons are: (1) the high likelihood that the Department will be obligated to undertake a second rule making to incorporate the revisions found in the newly revised federal requirements, and (2) the very

significant amount of resources the Department would need to complete, by itself, an assessment of the cost impact of a single-phase upgrade for existing facilities.

By leaving some possible rule changes to a second phase, the Department would have the benefit of more time to inform and educate owners and operators of facilities and tank systems to the possible future requirements and receive feedback from these persons. The Department would also be able to more efficiently incorporate changes to the newly revised federal requirements. The Department intends to rely on industry cost data that was gathered and analyzed by EPA in the course of the federal rule making. The Department's use of such data and analysis in the second phase is a far more efficient use of scarce resources than having the Department try to generate such information on its own. The industry cost data may be very important in decisions that the Department would need to make in setting the possible upgrade/closure deadline in the next revision to Part 613.

For the reasons stated in the Needs and Benefits section above, the Department chose to change the format of the Department's PBS rule to follow the template of 40 CFR Part 280. Although 40 CFR Part 280 covers only a subset of UST systems regulated pursuant to the ECL, the Department believes that the 40 CFR Part 280 template can be used in forming the regulatory structure for the requirements applicable to AST systems and the UST systems not subject to federal regulation.

Used Oil Management

For the federal changes which increase stringency, amending Subpart 374-2 is the only viable alternative available for assuring that the Department's regulations remain at least as stringent as the federal rules. The no-action alternative would result in the State's loss of authorization to administer the used oil program in lieu of EPA's implementation of the federal program. If this were to occur, the regulated community would have to satisfy two sets of

regulations (i.e., federal and pre-existing State) and the Department would suffer a loss of federal grant monies for the State program.

9. FEDERAL STANDARDS

Petroleum Bulk Storage

The proposed rule might be viewed as exceeding the requirements of 40 CFR Part 280 in that the proposed Part 613 requires and incorporates by reference a number of technology and operating standards that were only proposed as compliance options in the then proposed federal rule making. However, 40 CFR Part 280 appears to allow for prospective incorporations of industry standards – a mechanism not available under applicable State law. For example, 40 CFR section 280.20(b) requires that certain piping be “designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory” and then lists two standards that “may” be relied on.

Apparently, other unmentioned standards issued by a national recognized association could be relied on, including the latest standards that industry adheres to for new tank systems. Since the standards incorporated by reference into the proposed rule are noncontroversial, widely-followed standards for new tank systems, these standards do not exceed any minimum standards of the federal government.

Used Oil Management

The proposed changes would increase consistency between state and federal regulations and between the state petroleum bulk storage regulations and the state used oil regulations. Certain federal changes that increase stringency must be adopted to maintain authorization for the Department to implement the used oil program. Other revisions are made to more closely parallel federal regulations.

10. COMPLIANCE SCHEDULE

Petroleum Bulk Storage

Operators of certain UST systems would need to complete operator training and testing requirements within one year of the effective date of the rule. With regard to all other requirements, the regulated community would be required to comply upon adoption of the proposed rule. It is anticipated that the regulated community could comply immediately.

Used Oil Management

The regulated community would be required to comply upon adoption of the proposed rule revisions. It is anticipated that the regulated community could comply immediately.