



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[EPA-R04-UST-2020-0248; FRL-10013-46-Region 4]

Commonwealth of Kentucky: Final Approval of State Underground Storage Tank Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Commonwealth of Kentucky (Commonwealth or State) has applied to the Environmental Protection Agency (EPA) for final approval of its Underground Storage Tank (UST) program under Subtitle I of the Resource Conservation and Recovery Act (RCRA or Act). The EPA has reviewed the Commonwealth's application (State Application) and has made a final determination that the Commonwealth's UST program (UST Program) described in the State Application satisfies all the requirements necessary to qualify for final approval. Thus, the EPA is granting final approval to the State to operate its UST Program for petroleum and hazardous substances. On July 1, 2020, the EPA provided notification and an opportunity for comment on the Agency's tentative determination to approve the State's UST Program. No comments were received on the Agency's tentative determination and no further opportunity for comment will be provided.

DATES: This final determination and approval for the State's UST Program is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The documents that form the basis for this action are available electronically through www.regulations.gov (Docket ID No. EPA-R04-UST-2020-0248).

FOR FURTHER INFORMATION CONTACT: Ben Singh, RCRA Programs and Cleanup Branch, Land, Chemicals and Redevelopment Division, U.S. Environmental Protection Agency, Region 4, Atlanta Federal Center, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960; Phone number: (404) 562-8922; e-mail address:

singh.ben@epa.gov. Please contact Ben Singh by phone or email for further information.

SUPPLEMENTARY INFORMATION:

I. Background

Section 9004 of RCRA, 42 U.S.C. 6991c, authorizes the EPA to approve state UST programs to operate in lieu of the Federal UST program. Pursuant to RCRA section 9004(b), approval may be granted if the state program provides for adequate enforcement of compliance with the UST standards of RCRA section 9004(a); is “no less stringent” than the Federal program for the seven elements set forth at RCRA section 9004(a)(1) through (7); and includes the notification requirements of RCRA section 9004(a)(8). Note that RCRA sections 9005 (on information-gathering) and 9006 (on Federal enforcement) by their terms apply even in states with programs approved by the EPA under RCRA section 9004. Thus, the Agency retains its authority under RCRA sections 9005 and 9006, and other applicable statutory and regulatory provisions, to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the Agency will rely on Federal sanctions, Federal inspection authorities, and Federal procedures, rather than the State analogues to these provisions.

II. Commonwealth of Kentucky

The Kentucky Department for Environmental Protection (KYDEP) within the Energy and Environment Cabinet is the lead implementing agency for the UST Program

in the Commonwealth. The most recent amendments to the State UST regulations became effective April 5, 2019, and include revisions which correspond to the EPA final rule published on July 15, 2015 (80 FR 41566), which revised the 1988 UST regulations and the 1988 state program approval (SPA) regulations. The KYDEP has broad statutory and regulatory authority to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases, under Title XVIII of the Kentucky Revised Statutes (KRS), Chapter 224, Subchapter 60, and Title 401 of the Kentucky Administrative Regulations (KAR), Chapter 42 (2019).

In accordance with 40 CFR 281.50, the Commonwealth submitted a State Application to the EPA on October 7, 2019. On March 13, 2020, the EPA notified the Commonwealth that the State Application was complete. On July 1, 2020 (85 FR 39517), the EPA published a tentative determination announcing its intent to grant the Commonwealth final approval of its UST Program. Along with the tentative determination, the EPA announced the opportunity for public comment, and provided notice that a public hearing would be held if significant public interest was expressed. Because the EPA did not receive any comments or requests for a public hearing, no public hearing was held. In accordance with the requirements of 40 CFR 281.50(b), the State previously provided an opportunity for public notice and comment during the development of its UST Program regulations.

III. Final Approval Determination

The EPA specifies the requirements that state UST programs must meet for approval under section 9004 of RCRA, and the procedures for approving, revising and withdrawing approval of state programs, in 40 CFR part 281. In order to be approved, in

accordance with section 9004 of RCRA, each state program application must meet the general requirements in 40 CFR part 281, subpart A, and the specific requirements in 40 CFR part 281, subpart B (Components of a Program Application), subpart C (Criteria for No Less Stringent), and subpart D (Adequate Enforcement of Compliance).

As more fully described below, the EPA has determined that the Commonwealth's UST Program satisfies the general and specific requirements for approval, is no less stringent than the Federal UST program, and will provide for adequate enforcement of compliance as required by 40 CFR part 281, subparts A, C, and D, after this approval. Following approval, the KYDEP will continue to be the lead implementing agency for the UST Program in the Commonwealth, and will regulate the installation, operation, maintenance and closure of USTs, as well as releases from USTs.

As required by 40 CFR part 281, subpart B, the State Application contains the following: a transmittal letter from the Governor requesting approval; a description of the program and operating procedures; a demonstration of the State's procedures to ensure adequate enforcement; a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency; a General Counsel Statement; and copies of all relevant State statutes and regulations. As part of the State Application, the Kentucky Energy and Environment Cabinet General Counsel, signing in lieu of the State Attorney General pursuant to 40 CFR 281.24¹, has certified that the State

¹ 40 CFR 281.24(a) requires an Attorney General's statement, but allows it to be signed by independent legal counsel for the state rather than the Attorney General, provided that such counsel has full authority to independently represent the State agency in court on all matters pertaining to the State UST Program. The Kentucky Energy and Environment Cabinet General Counsel has represented that it has such authority and has submitted such statement in the form of a General Counsel Statement..

regulations provide for adequate enforcement of compliance and meet the no less stringent criteria in 40 CFR 281, and the EPA is relying on this certification in approving the State Program.

The State Application demonstrates that the KYDEP has adequate authorities for enforcement of compliance, as described at 40 CFR part 281, subpart D (281.40-43), including requirements for the UST compliance monitoring program; requirements for the UST compliance enforcement program; requirements for public participation; and the sharing of information.

As part of the State Application, the Commonwealth has identified the following specific statutory and regulatory compliance monitoring program authorities, required pursuant to 40 CFR 281.40: KRS 224.1-400, KRS 224.10-100, KRS 224.60-105, KRS 224.60-155, and 401 KAR 42:020.

As part of the State Application, the Commonwealth has identified the following specific statutory and regulatory compliance enforcement program authorities, required pursuant to 40 CFR 281.41: KRS 224.1-400, KRS 224.10-410, KRS 224.10-420, KRS 224.10-440, KRS 224.60-155, KRS 224.99-010, 401 KAR 42:020, 400 KAR 1:090, and 400 KAR 1:100.

As part of the State Application, the Commonwealth has identified the following specific authorities enabling public participation in the State enforcement process, required pursuant to 40 CFR 281.42: KRS 224.10-420 and 400 KAR 1:090 Section 14. Further, through a Memorandum of Agreement between the Commonwealth and the EPA, effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the State maintains procedures for receiving and ensuring proper

consideration of information about violations submitted by the public, and the Commonwealth will not oppose citizen intervention when permissive intervention is allowed by statute, rule or regulation. As required pursuant to 40 CFR 281.43, through the Memorandum of Agreement between the State and the EPA, the State agrees to furnish the EPA, upon request, any information in State files obtained or used in the administration of the State program. Therefore, the EPA is approving the Commonwealth to operate the State UST Program as described in the State Application. The EPA is hereby concluding that the State Application for the Commonwealth's UST Program approval meets all of the statutory and regulatory requirements established by Subtitle I of RCRA. Accordingly, the Commonwealth's UST Program will operate in lieu of the Federal program. The Commonwealth will have primary enforcement authority and responsibility for its State UST Program. This action does not impose additional requirements on the regulated community because the regulations being approved by this rule are already in effect in the Commonwealth, and are not changed by this determination. This action merely approves the existing State regulations as meeting the Federal requirements, thus rendering them federally enforceable. This final determination to approve the State UST Program applies to all areas within the State. Though the Commonwealth has primary enforcement responsibility, the EPA retains the right to conduct inspections under section 9005 of RCRA and to take enforcement actions under section 9006 of RCRA.

States may enact laws that are more stringent than their Federal counterparts. *See* RCRA section 9008, 42 U.S.C. 6991g. When an approved state program includes requirements that are considered more stringent than those required by Federal law, the

more stringent requirements become part of the federally approved program in accordance with 40 CFR 281.12(a)(3)(i). The EPA has determined that some of the Commonwealth's regulations are considered more stringent than the Federal program, and upon approval, they will become part of the federally approved State UST Program and therefore federally enforceable. In addition, states may enact laws which have a greater scope of coverage than the Federal program. These provisions are considered broader in scope and are not part of the federally approved program and are therefore not federally enforceable. *See* 40 CFR 281.12(a)(3). Although these requirements are enforceable by the Commonwealth as a matter of State law, they are not RCRA requirements. The statutory and regulatory provisions the Agency has decided to approve are found generally at KRS 224.60-100 *et seq.* and 401 KAR 42:005 *et seq.* However, the EPA has determined that the following State UST Program requirements are broader in scope than the Federal program.²

Statutory Broader in Scope Provisions

- KRS 224.60-130 to 140, insofar as these relate to UST registration requirements, the establishment of a Petroleum Environmental Assurance Fee, and the administration of the State Petroleum Storage Tank Environmental Assurance Fund.
- KRS 224.60-150, insofar as it relates to the authority to levy and collect an annual fee of thirty (30) dollars per tank from owners or operators of USTs for the purpose of funding the administration of the UST Program.

² If a statutory or regulatory provision is not identified in the following analysis as being broader in scope, then the provision is part of the approved UST Program and federally enforceable.

Regulatory Broader in Scope Provisions

- 401 KAR 42:020, section 2, insofar as it relates to the establishment of UST registration requirements and the collection of annual fees.
- 401 KAR 42:250, insofar as it relates to eligibility requirements and administrative procedures for the Petroleum Storage Tank Environmental Assurance Fund.
- 401 KAR 42:330, insofar as it relates to the eligibility requirements and rates for reimbursement from the Small Owners Tank Removal Account.
- 401 KAR 42:060, insofar as it relates to the UST Corrective Action Manual for site investigations and corrective action activities for releases from UST systems.

D. Statutory and Executive Order (EO) Reviews

This final action merely approves Kentucky's UST Program requirements pursuant to RCRA section 9004 and does not impose additional requirements other than those imposed by State law. For further information on how this action complies with applicable executive orders and statutory provisions, please see the EPA's tentative determination published in the July 1, 2020 **Federal Register** at 85 FR 29517. The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule

cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This final action will be effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

List of Subjects in 40 CFR Parts 281

Environmental protection, Administrative practice and procedure, Petroleum, Hazardous substances, State program approval, Underground storage tanks, and Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of Sections 2002(a), 7004(b), 9004, 9005 and 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), 6991c, 6991d, and 6991e.

Dated: August 18, 2020.

Mary Walker,
Regional Administrator,
Region 4.

[FR Doc. 2020-18567 Filed: 9/15/2020 8:45 am; Publication Date: 9/16/2020]