



March 31, 2014

Department of Environmental Protection  
Bureau of Waste Prevention  
One Winter Street, 7<sup>th</sup> Floor  
Boston, MA 02108  
Attn: Veronica O'Donnell

**Subject: LSP Association Comments - Proposed 310 CMR 80.00, and amendments to 310 CMR 30.00, 310 CMR 70.00, and 310 CMR 80.01 & 80.02**

Dear Ms. O'Donnell:

The LSP Association (LSPA), a professional non-profit association of over 800 Licensed Site Professionals and other environmental professionals, is pleased to submit comments and suggestions to the Massachusetts Department of Environmental Protection (MassDEP) on the Proposed Underground Storage Tank Regulations; these include:

- A. Underground Storage Tank Systems, 310 CMR 80.00 (New)*
- B. Hazardous Waste Management, 310 CMR 30.00 (Proposed Amendments)*
- C. Environmental Results Program, 310 CMR 70.00 (Proposed Amendments)*
- D. UST Operator Training, 310 CMR 80.01-80.02 (Proposed Amendments)*

all of which were published electronically and opened for public comment in February 2014.

The LSPA is commenting because our members have specific expertise and interest in these regulations as a result of their experiences with underground storage tank (UST) systems as part of their hazardous waste site assessment, cleanup, and removal work. In addition, some of our members have been qualified by MassDEP to be Third Party Inspectors of UST and associated piping systems. As such, our members - specifically LSPs - are in the unique position of having deep familiarity with and responsibilities under 310 CMR 40 (the MCP) as well as these proposed UST regulations.

Overall, LSPA comments focus on ensuring that the proposed regulations in 310 CMR 80 are consistent and coordinated with 310 CMR 40 and that the definitions presented are thorough and clear.



## **UNDERGROUND STORAGE TANK SYSTEMS, 310 CMR 80.00 (New)**

### **Comments and Questions on 310 CMR 80.03**

There are four proposed definitions which seem to require more detail or explanation, either through editing or guidance from the Department.

1. “Change-in-product means changing the type of product in an UST system from a regulated substance to another regulated substance or to a non-regulated substance. Changing from one grade of gasoline to a different grade of gasoline is not a change-in-product.”

With the expansion of ethanol use in the form of E15 (15% by volume ethanol/gasoline blends <http://www.epa.gov/otaq/regs/fuels/additive/e15/> ), does the storage of E15 in a UST formerly containing E10 constitute a Change-in-Use?

2. “Release means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an UST system into the ground water, surface water or subsurface soil.”

This definition is needlessly different from that in 310 CMR 40.0006 and 21E. While it is unnecessary to include the exemptions found in those places, it would seem reasonable to otherwise duplicate the language to avoid confusion or ambiguity. This change would also help provide a clearer distinction between “Release” and the proposed definition of “Leakage”. Additionally, the definition as written would seem to define a vapor release into the environment as neither a “Leakage” nor a “Release”.

3. “Threat of Release means a substantial likelihood of a release from an UST system which requires action to prevent or mitigate damage to health, safety, public welfare or the environment which may result from the release.”

While this definition is consistent with the language of MGL Chapter 21E, it would be clearer to the regulated community, including Licensed Site Professionals (LSPs), if this definition was made consistent with 310 CMR 40.0006.

4. Additionally, the definition provided for “Leakage” within 310 CMR 80 is problematic:

“Leakage means the escape of regulated substance from an UST system into an UST system component not intended to store regulated substance, including, but not limited to, interstitial spaces, a turbine sump, intermediate and dispenser sumps and containment areas.”



This directly contradicts 310 CMR 40.0314 (2), which states that Threats of Release Which Require Notification Within 72 Hours include results of a tank test "...which indicates there is a substantial likelihood of a leak equal to or greater than 0.05 gallons per hour...(2) in the inner wall of a double walled Underground Storage Tank..."

We recommend that consistency between 310 CMR 80 and 310 CMR 40 be sought to minimize the confusion of tank owners and operators, and to help mitigate the potential liabilities to Licensed Site Professionals which may result due to inconsistency in these regulations.

#### **Comments on 310 CMR 80.04**

In 310 CMR 80.04(2) "jointly" and "severally" are not defined. This makes it unclear whether these terms are meant to be used as in CERCLA, as in MGL 21E, or according to some other definition. There is not a reference to these terms for liability in MGL 21O.

Neither 310 CMR 80.04(8) nor 310 CMR 80.04(11) include a statement that the owner or operator is subject to closure requirements per 310 CMR 80.41-80.47. However, section (b) of both of these codes requires response to a release or threat of release per 310 CMR 80.38, which states that in the event of a release or threat of release, the Owner or Operator shall comply with 310 CMR 40.0000.

The LSPA is concerned that without conducting an assessment per 310 CMR 80.41-80.47, the owner or operator may not know whether or not a release or threat of release has occurred. However, in these two instances, the owner or operator is required to report such a release or threat of release. The LSPA suggests that 310 CMR 80.04(8) and 310 CMR 80.04(11) be revised to include a statement that the owner or operator is subject to closure requirements per 310 CMR 80.41-80.47. This requirement is already set by 310 CMR 80.04(9) (l) and 310

CMR 80.04(10) (j) for tanks with a capacity of over 1100 gallons. Specifically, this requirement would include 80.43(2) (b), which states that for the removal of an UST system, the owner or operator shall conduct an assessment in accordance with 310 CMR 80.43 (4) within 24 hours after the UST system is removed, but prior to backfill of the excavation area. Adding these requirements would ensure that an assessment was conducted upon removal of these USTs and thereby ensure that the tank owner/operator has the information needed to determine whether a response per 310 CMR 80.38 is necessary.



### **Comments on 310 CMR 80.11**

310 CMR 80.11(2) states that a full certification will be made when responding to written requests for information from the Department.

“(2) Unless otherwise required by law or 310 CMR 80.00, any person signing a document pursuant to 310 CMR 80.00, or when providing any other information ordered or requested by the Department in writing pursuant to 310 CMR 80.00, shall make the following certification: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment."

The text "...or when providing any other information ordered or requested by the Department in writing pursuant..." seems to indicate that an email response, a telephone call, or a facsimile providing information from an owner, operator, LSP, tank tester, repair technician, etc. would require such a certification. This seems unduly onerous and may provide opportunity for unintended acquisition of liability by LSPs. As it is unlikely that this is the intent of the Department, and as LSPs working on behalf of their clients must adhere to 310 CMR 40 and 309 CMR 1-9, the MGL, etc. this seems unnecessary.

### **Comments on 310 CMR 80.13**

“(1)(a) For purposes of implementing M.G.L. c. 210 and 310 CMR 80.00, personnel and/or representatives of the Department may, upon presentation of credentials, enter at a reasonable time with or without prior notice UST systems and facilities in order to:

1. Inspect or obtain samples from any person of any regulated substance in a tank;
2. Conduct monitoring or testing of the tanks, associated equipment, contents of the tank or surrounding soils, air, surface water or ground water; have access to, and copy all records, relating to such tanks.”

While the text of this regulation may be intended to provide the MassDEP flexibility in the selection of contractors to obtain samples and/or testing results from UST systems and the surrounding environment, we are concerned that as written the regulation fails to provide for any Chain of Custody procedure,



liability coverage for MassDEP, the “person”, the property owner or operator, or potentially an LSP involved with the situation. Similarly, MassDEP or its representatives (i.e. third party consultants, contractors, tank testing company personnel) should present sufficient evidence of ability, competency, insurance coverage, etc. This is critical in the event that a test is improperly performed, equipment or property is damaged, or perhaps even that a release is caused through error or malfeasance.

### **Comments on 310 CMR 80.16**

In clause 10, “Class I Flammable Liquid” is not defined, nor is a definition provided elsewhere in the regulation. While we assume that the definition is consistent with the definition used by the [National Fire Protection Association](#), the [US Department of Transportation](#), the [US Environmental Protection Agency](#), the [US Occupational Safety and Health Administration](#) , and others, it should be stated.

In clause 18, it states that “...A permanent dewatering well for the purpose of dewatering the tank grave in order to conduct repairs of the UST system may be installed if the well is seated in the tank grave and the well seals are designed and constructed to prevent migration of fluids from the ground surface into the borehole. ... 3. Surface (Apron) Seal d. Based on site conditions, the surface seal shall extend a minimum of four feet below grade to prevent frost-heaving of the apron.”

While the Standard References for Monitoring Well (WSC #91-310) recommends such surface seals, 20 additional years of monitoring well installations, and the performance of UST “tank pads” indicate that frost heaving is relatively rare in a properly designed tank pad of approximately 10 to 12-inch thickness. We recommend that such wells have a surface seal at least as thick as the UST pad in which it is installed.

### **HAZARDOUS WASTE MANAGEMENT, 310 CMR 30.00 (Proposed Amendments)**

The proposed regulatory amendments appear reasonable; they apply 310 CMR 80 to USTs for the storage of Waste Oil and Used Oil Fuel

### **ENVIRONMENTAL RESULTS PROGRAM, 310 CMR 70.00 (Proposed Amendments)**

The proposed regulatory amendments appear reasonable. UST systems become ERP facilities or units under 310 CMR 70, but the performance standards are referenced back to 310 CMR 80. The necessary certification schedule and conditions are contained in 310 CMR 80.34.

### **UST OPERATOR TRAINING, 310 CMR 80.01-80.02 (Proposed Amendments)**

The proposed regulatory amendments seem reasonable, and serve to move these two regulations into the framework of 310 CMR 80, with necessary reference changes.



Again, the LSPA's overall focus regarding the proposed 310 CMR 80 is to ensure that the regulations are aligned with 310 CMR 40 so as to limit potential liability to LSPs and to ensure clarity throughout. The LSPA is available to MassDEP for further assistance, given our expertise in this area.

The LSPA is pleased to participate in the public comment period and provide these comments to MassDEP regarding this important program.

Sincerely,

**LSP Association, Inc.**

A handwritten signature in black ink that reads 'Matthew E. Hackman'.

Matthew E. Hackman, LSP  
President

A handwritten signature in black ink that reads 'Wendy L. Rundle'.

Wendy L. Rundle  
Executive Director

Cc: Benjamin Ericson, Assistant Commissioner, BWSC, MassDEP