MEMORANDUM

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SUBJECT: **Guidance Document LPR-SRR-2014-02.**
Storage Tank Program Compliance Manual Volume 4: Compliance Process

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DATE: July 15, 2014

COPIES: Regional Directors

Summary:

This volume of the Storage Tank Program Compliance Manual provides guidance to DEQ staff on how to address issues concerning, and alleged violations of, UST regulations (9VAC25-580 *et seq.*), including: (1) notifying owners and operators of alleged violations; (2) performing compliance assistance and follow up, including when to refer a facility to enforcement; (3) resolving compliance issues; and (4) initiating and implementing delivery prohibition.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the public on DEQ's website at:
http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/PetroleumProgram/GuidanceRegulations.aspx.

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Disclaimer:

Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts.

STORAGE TANK PROGRAM COMPLIANCE MANUAL

VOLUME IV-COMPLIANCE PROCESS

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1 Introduction

This volume provides guidance to DEQ staff on how to address issues concerning, and alleged violations of, UST regulations (9VAC25-580 *et seq.*), including: (1) notifying owners and operators of alleged violations; (2) performing compliance assistance and follow up, including when to refer a facility to enforcement; (3) resolving compliance issues; and (4) initiating and implementing delivery prohibition. [1]

DEQ staff use the full range of compliance procedures and select the most appropriate one(s) for each case. The procedures are generally listed in increasing order of severity. While staff usually begin with the least adversarial method appropriate to the case, selecting a procedure lies wholly in DEQ's discretion, within the law and regulations. DEQ encourages open discussion between the Regional Offices (ROs), Central Office (CO) Program Offices, and the CO Division of Enforcement (DE) to ensure compliance and enforcement goals are met.

DEQ staff use three types of written correspondence to notify owners/operators of potential noncompliance: Requests for Compliance Action (RCAs), Warning Letters and Notices of Violation (NOVs). These are typically issued by DEQ compliance staff in consultation with enforcement staff. NOVs mark the transition from compliance to enforcement. [2]

2 Compliance Timelines

Tank compliance staff will initiate the compliance process after conducting a UST inspection.

2.1 Day 1 to 89 –Request for Compliance Action (RCA) to Warning Letter.

[1] Guidance documents set forth presumptive operating procedures. They do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. *See* Va. Code § 2.2-4001.

[2] The DEQ Civil Enforcement Manual (Enforcement Manual) provides guidance on timelines for issuing compliance and enforcement documents. Within the Enforcement Manual it states that Program guidance may supplement the informal correction procedures described in the Enforcement Manual and modify the timelines described in those procedures.

Staff generally initiate compliance activities by sending an RCA (either a paper form or electronic version) to the owner/operator[3] preferably within 14 days after the inspection. The RCA is informal in tone and provides a basic, comprehensive description of the potential violations observed during the inspection, along with suggested corrective actions. All owners/operators of potentially noncompliant UST facilities should receive this RCA, regardless of the estimated time to return to compliance, unless an exception described in Section 3 applies. During this period, staff generally provide informal compliance assistance to encourage return to compliance.

The RCA should require the owner/operator to complete corrective actions within 90 days after the date of inspection. If the 90-day period for compliance has elapsed and the owner/operator has not achieved compliance, staff should issue a Warning Letter, unless an exception described in Section 3 applies.

2.2 Day 90 to 179 –Warning Letter to Notice of Violation (NOV).

By Day 90, if the owner/operator has not returned to compliance or signed a Tank Compliance Agreement (see next section), and a Warning Letter has not yet been issued, staff shall issue a Warning Letter requiring return to compliance. A Warning Letter is a compliance instrument that describes the factual observations made at the time of the inspection, recites the applicable law, and provides the process for obtaining a final decision on whether a violation exists.[4] Staff should copy Warning Letters to the UST operator, if applicable. Staff may continue to provide informal compliance assistance during this period to encourage return to compliance. Staff may also skip the Warning Letter and go directly to an NOV under certain circumstances discussed in Section 3.

[3] In the UST program, tank owners are traditionally pursued first for compliance because owners are the more identifiable party due to DEQ's registration program. However, the Regulation holds both the owner and operator equally responsible for compliance; therefore, staff should be prepared to pursue the operator for compliance if circumstances warrant.

[4] Warning Letters are Notices of Alleged Violation and have requirements associated with them that are imposed by statute. (Va. Code §62.1-44.15(8a). Staff may find a more detailed discussion of the Warning Letter and its requirements in Chapter 2 of the Enforcement Manual. A UST Warning Letter template may also be found in Chapter 2A of the Enforcement Manual at: http://www.deq.virginia.gov/Programs/Enforcement/Laws,Regulations,Guidance.aspx.

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2.3 Tank Compliance Agreement

A Tank Compliance Agreement (TCA) is an informal compliance tool that represents an agreement between the owner/operator and DEQ to return the owner/operator to compliance. The TCA is a written agreement, signed by both the DEQ regional office and the owner/operator, setting out the required corrective action and deadlines to return to compliance. An owner/operator can enter into a TCA any time after an RCA is issued and before staff issue an NOV. The maximum amount of time allowed to return to compliance, including any approved extensions, is twelve (12) months from the date of the inspection. Regardless of where the TCA occurs in the process, if the owner/operator fails to meet the compliance deadlines set out in the TCA, staff should issue an NOV and refer the owner/operator to enforcement.

2.4 Day 180 –NOV.

By Day 180, DEQ compliance staff in consultation with regional enforcement staff, shall issue an NOV[5] if (1) the owner/operator has not returned to compliance or signed a TCA, and (2) an NOV has not yet been issued. Staff should copy NOVs to the operator, the landowner, and the State Corporation Commission (SCC) registered agent, if applicable. Once the NOV has been issued, the case should be referred to Regional Enforcement staff for resolution.

2.5 Return to Compliance

If the owner/operator completes and documents satisfactory return to compliance before the issuance of the NOV, staff should close the compliance case by resolving the action in CEDS following the appropriate database procedures. Staff should also send a return-to-compliance acknowledgement to the owner. (See **Appendix-M).**

[5] For a detailed description of the NOV and its requirements, please see Chapter 2 of the Enforcement Manual at http://www.deq.virginia.gov/Portals/0/DEQ/Enforcement/Guidance/Chapter2-Text.pdf. Standard language to insert in a UST Notice of Violation can be found in Chapter 2A of the Enforcement Manual at http://www.deq.virginia.gov/Portals/0/DEQ/Enforcement/Manual/Chapter2/attachments/Chapter2A-Attachments(2013-12-2).pdf.

3 Accelerated Compliance Follow-up Scenarios

3.1 Introduction

The preceding section outlines the typical compliance process timeline. Compliance staff should follow the compliance timelines set out in the preceding section; however, under certain circumstances, it is appropriate to move more quickly through the compliance process, which typically means going straight from the RCA to the NOV. Rapid elevation, including use of the Delivery Prohibition process (see section 5), may be appropriate based on: (1) the failure to meet a TCA deadline; (2) the status of outstanding enforcement issues at the same facility; (3) the owner's/operator's compliance history; (4) newly discovered issues at re-inspected facilities; or (5) the gravity of the violation.

3.2 Failure to Meet TCA Deadlines

As discussed in Section 2.3, staff should move directly to an NOV in cases where an owner/operator has failed to meet compliance deadlines in a TCA. Violations of consent orders, unilateral orders or letters of agreement typically will be addressed by enforcement staff.

3.3 Active NOV from Previous Inspection

If the current owner/operator has an active, unresolved NOV for the facility at the time of its inspection, and additional non-compliance is discovered (regardless of whether the potential violations are the same or similar), then the inspector should elevate the compliance response. An active, unresolved NOV is one that has been referred to enforcement and has been neither settled through an Order or Letter of Agreement nor de-referred. Under these circumstances, another NOV should be issued to the owner/operator, along with a copy of the inspection report. Compliance staff should coordinate with the enforcement staff handling the outstanding action to determine who should send the NOV.

3.4 Compliance History

Staff should accelerate the compliance response when an owner/operator received an NOV at the same facility during the last inspection cycle, regardless of whether the potential violations are the same as the ones identified through previous inspections. In these cases, staff should issue an RCA and give the owner/operator an opportunity to resolve the

potential noncompliance. However, if the owner/operator does not return to compliance within the timeframe prescribed by the RCA, staff should issue an NOV and refer the case to enforcement.

3.5 Violations Discovered During Site Visit or Re-Inspection

During the course of enforcement after an NOV has been issued, enforcement staff will occasionally request that compliance staff visit or re-inspect a facility that is subject to a current enforcement action. If the inspector identifies any new compliance issues during this re-inspection or site visit, compliance staff should coordinate with the enforcement staff handling the outstanding action to determine who should send the NOV and refer the matter to the appropriate enforcement staff for follow up activities.[6]

3.6 Potential for Harm

By Regulation[7], DEQ addresses certain alleged violations differently due to the potential harm they pose to the environment. Tank systems that are not equipped with basic pollution prevention equipment represent a substantial threat of environmental impact. Because of this, these "failure to install" issues[8] are addressed through the expedited delivery prohibition process discussed in Section 5.4.

4 Addressing Non Compliance With Parties Other Than the Registered Owner

4.1 Registered Owner

State Water Control Law[9] and its accompanying regulations[10] hold both the UST owner and the operator responsible for compliance with pollution prevention requirements. As a

[6] Issuing an NOV at the onset allows resolution of the newly discovered issues to move forward at the same pace as the outstanding enforcement action. This is particularly critical if enforcement staff are contemplating delivery prohibition because, for most potential violations, DEQ must first issue a warning letter or NOV and give the owner an opportunity to comply before initiating delivery prohibition. Once the NOV is issued and an opportunity to comply provided, enforcement staff can include the newly discovered issues in the delivery prohibition proceeding along with the outstanding ones.
[7] 9VAC25-580-370.
[8] See Appendix C for the types of potential violations that must be addressed through expedited delivery prohibition and Section 5 for a discussion of the process.
[9] Va. Code §62.1-44.34:8 *et seq*.

program practice, DEQ has pursued the entity that has registered the tanks with DEQ (registered owner) first. Generally speaking, pursuing compliance with one entity rather than multiple ones results in a quicker return to compliance. The registered owner is the logical choice because this entity has identified itself through the registration process as the UST owner and a responsible party for compliance.

The registered owner is not the only option for achieving compliance, however. In some situations, the registered owner may no longer be a viable responsible party for purposes of returning the facility to compliance. In the following circumstances, the registered owner may not be considered a viable responsible party for compliance if:

- The registered owner is deceased;
- The registered owner has filed a liquidating bankruptcy action;
- The registered owner is no longer an active legal entity;
- The registered owner cannot be located;
- The registered owner has permanently left the state or country evidencing an intent to abandon its compliance responsibilities; or
- The registered owner is an out-of-state corporation that is no longer doing business in Virginia.

If, through the compliance process, the registered owner proves to be unresponsive and staff discover that one of these factual circumstances applies, staff should look to other potential parties for compliance.

4.1.1 Registered Owner is no longer an active legal entity

Although the criteria above are generally self-explanatory, the circumstance where the registered owner entity is no longer in existence as a legal entity (defunct) requires additional discussion. Staff often learn through the compliance process that the registered owner is no longer deemed an "active" entity by the State Corporation Commission ("SCC"). [11] Generally, a

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[10] 9VAC25-580.

[11] See https://cisiweb.scc.virginia.gov/z_container.aspx With this link, staff can access the State Corporation Commission's Clerk's Information System database to identify an entity's status, officers, registered agent, address and other information. Click on the bottom link ("Name Search all Entities"), then type some or all of the entity's name in the blank provided and click Enter. Scroll through the list of names provided (hit F8 to access the next page on the list, F7 for the previous page, and F2 to return to the search entry page), select the correct entity, and double click. Select desired option from list provided. The website can be difficult to use. For example, if the company name is a person's name, such as Michael W. Jones Builders, Inc., then you must search for Jones Builders, Inc., Michael W. However, this rule doesn't apply in every case, so when in doubt, staff can obtain definitive information by contacting the Clerk's Office Call Center at (804) 371-9733 or toll-free (in Virginia only) 1-866-SCC-CLK1 (1-866-722-2551).

corporation or LLC[12] that is listed as "terminated", "cancelled" ,"dissolved", or "purged" in the SCC database is defunct and cannot be pursued for compliance.

In some cases, however, the entity's operating authority has been terminated automatically by the SCC due to its failure to pay annual filing fees. The database will indicate if the termination was an automatic one due to nonpayment of fees. In this event, staff should continue to pursue the entity and note in the correspondence that the SCC database indicates that the business has been terminated for non-payment of fees. Often the business, upon learning this information, will make the payment and become reinstated as an active entity. When in doubt about whether an entity is defunct, staff should contact the Office of Spill Response and Remediation (OSRR). In situations where the entity is no longer a valid legal entity (other than the situation described in this paragraph) staff should pursue other options for compliance.

4.2 Operator

If the UST facility is operating and the registered owner no longer exists or is not a viable party to pursue, staff should pursue the operator for compliance. State Water Control Law defines an operator as "any person in control of, or having responsibility for, the daily operation of the underground storage tank."[13] An operator is the person or entity having ultimate authority or the right to exercise control over the UST's day-to-day operations. An operator of a UST is a person or entity who has the responsibility for performing any of the requirements of the UST Technical Regulation. For example, an operator is a person or entity who is responsible for inspecting regulated substance deliveries; monitoring any regulated component of the UST system; or controlling surface spills of petroleum from a UST facility. Station or facility managers who are employees of the person or entity with superior authority over the UST's operations are not operators. In this case, the person with the superior authority over the USTs would be the operator. Staff can also refer to the Class A and Class B operator designations on file with the facility to assist in identifying the tank operator.

A person may be both the operator and the owner of a UST. In addition, operators include, but are not limited to, persons or entities that operate USTs (a) leased or franchised from the UST owner, or (b) used by the operator as part of an exclusive supply contract.

Petroleum suppliers who provide product to a person or entity on a consignment basis may be considered operators. A consignment arrangement is defined as follows: (a) the person

[12] If the business is neither a partnership, corporation nor limited liability company (LLC) then it is considered a sole proprietorship and the individual who owned the business is the person who is responsible for compliance.
[13] Va. Code §62.1-44.34:8

or entity receiving the product does not purchase/own the product but does, however, receive a predetermined percentage of actual sales, and (b) the petroleum supplier has the responsibility for maintaining and gauging tanks, and performing UST regulatory requirements. A person or entity, which receives a product on a consignment basis and has no responsibility for performing any of the requirements of the UST Regulation, may not be an operator of a UST.

Staff should consult with OSRR for assistance with identifying an operator to pursue.

4.3 Landowners as Tank Owners

In the past, DEQ generally considered the landowner to be the UST owner only in those cases where (1) the registered UST owner and the landowner are the same; or (2) the UST is not registered with DEQ. DEQ took this approach because the UST owner could be a different entity than the landowner and the UST registration form was considered sufficient to identify the UST owner when the UST owner and landowner differed. DEQ considered the registration form a reflection of the parties' intent to separate the UST from the land such that it became the personal property of the entity registering the UST rather than a fixture that existed as part of the land, like a wall or a fence.

From a property law standpoint, however, courts generally consider USTs to be fixtures[14] rather than personal property. The analysis used by courts to identify whether an item is a fixture emphasizes the UST owner's intent to make the item a permanent addition to the real property. Although DEQ has considered the UST registration form dispositive on the issue of intent in the past, case law, as well as other states' practice, support treating the UST as a fixture in these situations where a breakdown in the relationship between the landowner and the UST owner has occurred. Consequently, a landowner may be considered the tank owner in those situations where the tank is a fixture to the land. Therefore, where (1) the registered owner meets the conditions described in Section 4.1 above; (2) no operator exists and (3) the available evidence indicates that the UST is a fixture, staff may pursue the landowner for compliance. Contact OSRR for help in analyzing whether a UST is a fixture in a particular case.

[14] Generally, courts apply a three-part test when analyzing whether a tank becomes a fixture of the real property. The test looks at:

1. The nature of the tank's annexation to the realty and the annexation's degree of permanency,
2. The tank's adaptation to the property's use or purpose, and
3. The UST owner's intention to make it a permanent addition to the real property.

Danville holding Corp. v. Clement, 178 Va. 223, 232, 15 S.E.2d 245, 250 (1941).

4.4 Lenders

Generally, banks or other financial institutions that hold mortgages on the UST facility property and foreclose on the facility property are not considered UST owners or operators under law.[15] State Water Control Law provides an exemption from compliance and cleanup liability to persons or entities that have a security interest in real property on which regulated USTs are located ("lenders"). This exemption allows lenders to foreclose on property with USTs and perform certain compliance activities (e.g., removing the UST, pumping the product out of the UST, reporting a release) without incurring liability as the UST owner.

Lenders may perform site assessments at UST facilities as a part of foreclosure or prior to foreclosure to assess whether the property is contaminated. If the property is contaminated, lenders often apply to DEQ for exemption from cleanup liability. Lenders that are granted the exemption are required to empty the tanks of product within 60 days of foreclosure and place the USTs in temporary or permanent closure. Therefore, although lenders that qualify for the exemption are not required to bring the tanks into compliance with pollution prevention requirements[16], the exemption process reduces the risk posed by noncompliant tanks by forcing product removal and temporary or permanent closure.

NOTE: A lender must submit a Notification for Underground Storage Tanks (USTs) Form 7530-2 to document closure as part of the temporary and permanent closure requirements; however, they are not required to sign the form as an owner. Lenders can submit an unsigned form to comply with the closure notification requirements.

Staff should direct any interested lenders to DEQ's Lender Liability Exemption Guidelines and refer them to OSRR for additional guidance.

4.5 Compliance Process

This section discusses the process for addressing noncompliance at a UST facility without a viable registered owner or operator.

[15] Va. Code §62.1-44.34:8.

[16] Lenders may become responsible for compliance if they operate the USTs after the foreclosure. Operator liability is not covered by the exemption.

4.5.1 Initiating the Compliance Process

Staff should begin the compliance process, as usual, by sending an RCA to the registered owner. If the registered owner is nonresponsive and falls into one of the categories listed in Section 4.1 and no UST facility operator exists, then staff should identify the landowner.

4.5.2 Identifying the Landowner

Generally, staff can access a locality's real property records to identify a landowner. Most localities offer this information through an online database, usually through the Tax or Real Estate Assessor's office or the Commissioner of Revenue's office.[17] If the information is not available online, staff can still obtain it by calling the appropriate locality office directly. The website should also provide a billing or mailing address for the landowner. OSRR staff are available to assist regional staff with identifying land owners.

4.5.3 Contacting the landowner

Once the landowner is identified, staff should send a copy of the RCA along with a letter notifying the landowner that noncompliant tanks are located on his or her property and requesting information concerning the status of the tanks. (see **Appendix-A**) for a sample letter.) The letter should also explain tank compliance requirements and ownership consequences, and will allow the landowner the opportunity to refute ownership. If the landowner indicates a willingness to return the tanks to compliance, then staff should work with the landowner to achieve compliance. If the landowner refutes ownership and provides documentation, staff should consult with OSRR to determine whether to proceed. If the landowner is not cooperative but the UST appears to be a fixture, then staff may pursue the landowner as in 4.5.5 below. OSRR will evaluate any documentation provided as described below.

4.5.4 Evaluating a landowner for tank ownership

Evaluating whether a landowner should be considered the tank owner is a fact dependent process. Relevant documents are any documents that may aid in analyzing UST ownership, such as deeds, bills of sale, lease agreements, or contracts involving use or

[17] Usually, staff can find the appropriate website by typing the locality's name and the words "property search" into the internet search engine, e.g., "Campbell County Virginia property search".

ownership of the USTs from the landowner or registered owner[18]. For example, lease agreements may contain clauses that deal with the disposition of personal property upon termination of the lease or abandonment. Similarly, contracts may have termination clauses that specify UST ownership. The landowner may provide sale documents that demonstrate that the tanks were specifically excluded from the sale of the property (e.g., VDOT frequently includes such clauses when acquiring property for transportation purposes.) Staff should provide the documents to OSRR staff who will perform an ownership analysis and notify regional staff of the result.

The absence of written documentation should not prevent pursuit of the land owner for compliance, however. For example, staff may also consider whether the landowner has taken actions regarding the UST(s) that indicate an ownership interest, such as marketing the property as a gas station. The Department of Agriculture and Consumer Services' Weights & Measures listing of UST facility site data may be another ownership data source. Whenever the situation arises where the registered owner is not viable and there is no facility operator, staff should consult with OSRR because the circumstances may warrant pursuit of the landowner for compliance.

4.5.5 Pursuing a Landowner for compliance

If the landowner does not refute ownership or respond by the deadline set in the letter, staff should issue a Warning Letter to the landowner. If the landowner is unresponsive or refuses to comply with the Warning Letter, staff should assess the risk posed by the noncompliant tanks before continuing with the compliance process.

4.5.6 Assessing Risk & Referring the Landowner to Enforcement

After the Warning Letter deadline has passed, staff must decide whether to pursue the landowner further for compliance. Staff should evaluate whether the facility has been identified as "low risk" or "high risk" based on the criteria found in DEQ's Risk Based Inspection Strategy (RBIS) for Underground Storage Tanks (USTs) guidance[19]. If the facility meets the RBIS criteria for "high risk", then staff should issue an NOV and refer the case to enforcement.

Staff should copy the local fire official's office on the NOV to notify local fire personnel of the existence of noncompliant petroleum storage tanks on the property.

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[18] In the case of a defunct corporation or limited liability company, officers of the entity may still be available to provide the documents.

[19] http://www.deq.virginia.gov/Portals/0/DEQ/Land/Tanks/LPR-SRR-01-2012.pdf.

4.5.7 Closing the Compliance Case without Referral to Enforcement

In cases where there is (1) no viable party to pursue for compliance or (2) the facility is identified as "low risk" according to the RBIS criteria, staff should administratively close the compliance case without further action. An administrative closure occurs when staff close the compliance case without resolution of all the potential noncompliance. Staff should document the compliance file with a compliance case administrative closure memo that outlines the reasons for administrative case closure, including which of the above-listed closure criteria were met and the basis for determining that the criteria were met. For example, if the reason for case closure was the inability to locate a viable party to pursue, staff should state that in the memo and describe the steps taken to determine the lack of a viable registered owner, operator and landowner. Staff should also send a letter to the landowner (in those cases where the landowner has been located) notifying the landowner of the potential consequences of leaving noncompliant USTs on the property. (see **Appendix-B**.) Finally, staff should note the administrative closure in CEDS.

4.5.8 Subsequent Inspections

Although staff may have closed the compliance case before the facility returned to compliance, staff should continue to inspect the facility in the standard three-year cycle to assess whether any changes have occurred that would suggest renewing the compliance action. For example, staff should check to see if the registered owner has resurfaced, the UST facility is back in operation or the property has changed hands. If the situation remains unchanged, no compliance follow-up is necessary. Staff should document the file to that effect with a memo.

5 Delivery Prohibition

This section provides guidance to regional petroleum tank compliance and enforcement staff on the process for imposing fuel delivery prohibition (issuing a "red tag") on noncompliant USTs. This section differentiates between expedited implementation of the delivery prohibition process and implementation of delivery prohibition through the traditional compliance and enforcement process.

5.1 Background

The Federal Energy Policy Act of 2005 (EPACT) makes it unlawful for anyone to deliver a regulated substance into or accept delivery of a regulated substance into certain noncompliant USTs. EPACT also requires states to promulgate regulations to develop processes and

procedures to implement the delivery prohibition requirement. In 2008, EPA developed guidance to the states on how to implement the delivery prohibition process. Part IX of the Virginia UST Technical Regulation (9VAC25-580-370) was promulgated to comply with the requirements imposed by EPACT, as well as EPA guidance, and provides criteria to identify USTs subject to delivery prohibition. The Regulation also describes, in general, the process to "tag" a UST that is subject to delivery prohibition. This section provides DEQ regional staff with additional detail on how to identify a UST subject to delivery prohibition and the procedures for moving through the delivery prohibition process.

5.2 Delivery Prohibition Regulatory Requirements

The Regulation, as adopted, identifies two broad classes of violations and differentiates between the response appropriate for each of the two classes. The first class of violations encompasses instances where a tank is not installed with the necessary pollution prevention equipment. These types of violations are referred to as "not equipped to comply" violations and warrant implementation of an expedited delivery prohibition process. In this expedited process, staff identify a violation and move directly into the delivery prohibition process. The second class of violations, with a couple of exceptions, falls into the category of operation and maintenance. These violations are first addressed using traditional compliance and enforcement mechanisms before staff begin the delivery prohibition process. **Appendix-C** provides the general matrix staff should use to differentiate between violations that warrant the expedited delivery prohibition process and violations that warrant the regular track.

5.3 Expedited vs. Regular Process

The following discussion describes an "expedited" process track and a "regular" process track for implementing delivery prohibition. There are two major differences between the two tracks. The first difference is that staff **must** initiate delivery prohibition if they discover a potential expedited violation. For regular track violations, the regional office has the option to pursue delivery prohibition as part of the enforcement process.

The second difference lies in how quickly staff initiate delivery prohibition. On the expedited track, staff initiate delivery prohibition immediately after the inspection or receipt of information indicating a potential violation exists. On the regular track, staff first use traditional compliance and enforcement mechanisms to resolve the alleged violations before moving to delivery prohibition. The track taken is dependent upon the type of potential violations discovered during the inspection. Once delivery prohibition proceedings have begun, the steps in the process are essentially the same for both tracks.

Inspectors should be familiar with the potential violations that will initiate the expedited delivery prohibition process. (see **Appendix-C** for potential violations warranting expedited delivery prohibition.)

5.4 Expedited Process

5.4.1 Inspection

During an inspection, if staff identifies a potential violation warranting expedited delivery prohibition (see **Appendix-C**), the inspector must provide an RCA that specifies the potential delivery prohibition violation(s) and contains language explaining the delivery prohibition process. This RCA will be provided after the inspection via first class mail with delivery confirmation and email to the owner/operator.

5.4.2 Post-Inspection

The inspector and regional office Petroleum Programs Manager should review the inspection report and decide whether the alleged violations merit expedited delivery prohibition. If they decide that there is a potential violation that falls into the expedited category, staff **must** mail a Notice of Delivery Prohibition Proceedings (Notice) to the owner and operator, if they are different entities, identifying the potential violation(s) (see **Appendix-D**). The Notice should be mailed using delivery confirmation or delivery receipt within 3 to 10 business days of the inspection and should include a copy of the inspection report. Sometimes, staff may need to gather additional information after the inspection to determine if a potential violation exists before proceeding with the Notice. In these situations, staff are not required to send the Notice within 10 business days but should move promptly to gather the information necessary to develop the case. In any event, staff should send the Notice as soon as possible after identifying that potential expedited violations exist. Staff may also hand deliver the Notice to the employee in charge at the facility in lieu of mailing it. If the owner/operator is a corporation or limited liability company and there is any question about the reliability of the address used to mail the Notice, staff must mail a copy of the Notice using delivery confirmation or delivery receipt to the owner/operator's registered agent.[20] If ownership is

[20] See https://cisiweb.scc.virginia.gov/z_container.aspx . With this link, staff can access the State Corporation Commission's Clerk's Information System database to identify an entity's status, address and registered agent. Click on the bottom link ("Name Search all Entities"), then type some or all of the entity's name in the blank provided and click Enter. Scroll through the list of names provided (hit F8 to access the next page on the list, F7 for the previous page, and F2 to return to the search entry page), select the correct entity, and double click. Select desired option from list provided. The website is archaic and often difficult to use, for example, if the company name is a person's name, such as Michael W. Jones Builders, Inc., then you must search for Jones Builders, Inc.,

disputed, staff must mail a copy of the Notice using delivery confirmation or delivery receipt to all potential owners. Staff may choose to notify the landowner as well. Staff may also fax or email the Notice to the owner and operator in addition to mailing the Notice.

NOTE: Although the regulation allows staff to give notice of the impending delivery prohibition process by leaving a copy of the Notice with the employee in charge at the facility, staff must make every effort to mail the Notice to the owner and the operator (and/or the registered agent) if there is a reliable contact name and address in the file.

The Notice should only contain alleged expedited violations. All other alleged violations should be pursued through the regular compliance/enforcement process. This is referred to as the "dual track" or "parallel track" process.

5.4.3 Central Office Coordination

Central office will collaborate with the regional office regarding use of delivery prohibition for expedited cases. Regional office staff **must** provide a draft copy of the Notice to the OSRR Legal Coordinator and the Central Office Tank Enforcement Manager in the Division of Enforcement (DE) for review and consultation prior to mailing the Notice to the owner and operator.[21] OSRR will communicate any concerns to regional staff promptly. Regional office staff may contact OSRR or DE at any time before drafting the Notice to discuss the suitability of a candidate.

5.4.4 Notice of Delivery Prohibition Proceedings

The Notice will inform the owner and operator that DEQ intends to hold an Informal Fact Finding Proceeding (IFF) to determine whether the issues identified during the inspection are violations of the regulation that warrant delivery prohibition. Staff must use the boilerplate Notice in **Appendix-D** to notify the owner and operator of DEQ's intent to begin delivery prohibition proceedings. The Notice is designed to provide the owner and operator with all the information required by the Administrative Process Act (§§2.2-4000 *et seq*.) and any changes to the Notice must be approved beforehand by OSRR and DE.

Staff should contact the owner and operator before sending the Notice to notify them that the IFF is forthcoming and offer a choice of meeting dates. The date should be between 21

Michael W. However, this rule doesn't apply in every case, so when in doubt, staff can obtain definitive information by contacting the Clerk's Office Call Center at (804) 371-9733 or toll-free (in Virginia only) 1-866-SCC-CLK1 (1-866-722-2551).

[21] Regional office staff should develop a Notice distribution list within their region to ensure that any staff who may be involved in the delivery prohibition process are copied.

and 60 calendar days from the date of the inspection. The date for the IFF should be chosen before the Notice is sent and prominently displayed in the Notice.

5.4.5 Waiver

The Notice contains language informing the owner/operator of the option to waive the informal fact finding proceeding. A waiver form should be included with each Notice sent (see **Appendix-E**). If both the owner and operator (if existing) sign and return the waiver, staff may cancel the informal fact finding proceeding and move directly to a decision. In this case, the regional Petroleum Programs Manager should review the Notice and supporting documents and decide whether delivery prohibition should be imposed. Regional staff may then attach the red tags to the noncompliant tanks.

5.4.6 Return to Compliance Prior to IFF

The Notice will clearly state that the owner/operator may correct the alleged violations prior to the IFF. The Notice will provide that the owner/operator must submit any documentation at least 3 business days prior to the meeting if he/she intends to demonstrate compliance before the IFF. If the owner/operator submits documentation to demonstrate compliance by the deadline, staff should review the documents promptly and, if the documentation sufficiently demonstrates that the alleged violations are corrected, staff should cancel the IFF and notify the owner/operator of the cancellation in writing (see **Appendix-F**). If the documentation does not demonstrate compliance then staff should promptly communicate in writing any deficiencies to the owner/operator (see **Appendix-G**). (These communications can be sent via mail, fax or email.)

5.4.7 Delivery Prohibition IFF:

Delivery prohibition IFFs should be held in the regional office, although extenuating circumstances may warrant holding the IFF in central office. Regional office staff should contact the owner/operator to schedule the IFF date. If the owner/operator cannot make the chosen date, staff can offer one alternative date. If the owner and/or operator does not show up on the day of the meeting, the meeting will be held in their absence.

OSRR will designate a presiding officer for each scheduled delivery prohibition IFF. [22] The presiding officer will handle logistical communications with the owners/operators once the Notice has been sent and will make decisions regarding rescheduling. Regional office staff may

[22] Central office will maintain a pool of volunteers to act as backup for these individuals.

continue to discuss compliance issues with the owner/operator. The presiding officer, in conjunction with central office, will be responsible for maintaining the red tags for the regions and providing them to regional staff at the IFF, if necessary.

The proceeding should be informal in tone. Regional program staff will advocate at the meeting on behalf of DEQ. At the region's discretion, the job of advocate can be handled by the inspector, an enforcement specialist or manager, or the Petroleum Programs Manager. An Advocate Checklist is available for regional staff to use to prepare for the proceeding (see **Appendix-H**). The proceedings should be recorded via audio recorder.

In most cases, the presiding officer's goal will be to issue the decision orally and in writing during the meeting. To facilitate this goal, a boilerplate decision document has been created for use in each individual delivery prohibition decision (see **Appendix-I**). If a decision is not rendered at the meeting, the presiding officer will follow up with a written decision using delivery confirmation or delivery receipt to the parties within a reasonable time.

If neither the owner nor operator is present at the IFF or if one of them is not present, then the presiding officer should mail the decision to the absent party(s). Facsimile or email transmission with receipt confirmation can be used in lieu of mail. If the presiding officer finds that no violation exists, he or she will state that in the decision and state that the delivery prohibition process is concluded.

If the presiding officer makes a decision to impose delivery prohibition, the presiding officer must immediately notify the OSRR Legal Coordinator, who will notify the webmaster to update the DEQ webpage. Copies of this decision must also be provided to the OSRR Director, the OSRR Legal Coordinator and the OSRR Training Coordinator. The OSRR Training Coordinator will use this information to update the delivery prohibition email notification list.

In situations where the delivery prohibition IFF is combined with an 1186 proceeding, DE staff will advocate at the proceeding. These proceedings are generally more formal in tone, and the presiding officer will not issue an immediate decision but will instead recommend a course of action to the Director. The final order will be signed by the Director. After an order is issued, the remaining procedures in Section 5 will apply.

5.4.8 Attaching the Delivery Prohibition Tag

If the owner or operator is present at the IFF and the presiding officer determines that a delivery prohibition violation exists, the regional office inspector or other staff should return to

the facility no later than 5 business days from the date of the decision and attach a delivery prohibition (red) tag to the fill pipe for each designated tank. If none of the potential responsible parties are present for the IFF, staff should wait 3 business days from the date the decision is mailed to the responsible parties before tagging, unless the parties have confirmed receipt before the 3 days have elapsed. Regional staff may tag immediately if any of the potential responsible parties are present at the IFF. The inspector should make an attempt to notify the owner/operator by telephone or email of the anticipated date that the tag will be applied. Staff should also contact OSRR's Legal Coordinator with the proposed tag date.

Before attempting to affix the tag, the inspector may take any precautions necessary to protect his or her safety, which may include requesting a police escort or other protection, or leaving the site at any time if conditions appear hostile.

When the tag is attached to the fill pipe, staff must match the tag number to the designated tank as specified during the IFF and in the delivery prohibition decision. The inspector must photograph the UST(s) fill pipe before and after the tag is in place. The inspector may also check the volume of fuel in the UST(s) and take a dispenser totalizer reading.

Regional staff should make every effort to attach the delivery prohibition tag to the tank's fill pipe and must use DEQ issued zip ties.[23] If the spill bucket around the fill pipe is full of water or product and the tag cannot be applied, then the inspector should request that the owner/operator empty the spill bucket in accordance with proper disposal requirements. If the owner/operator refuses to empty the spill bucket, the inspector should, at a minimum, attach the tag to the manhole cover, or other available location. Regional staff must photograph the full spill bucket and the tag, and document the owner/operator's refusal before leaving the facility. Regional staff should document all observations, actions and conversations while at the site in a memo to the file. As soon as possible after the tag(s) have been attached, staff should notify OSRR's Legal Coordinator with the date the tag was attached and any issues that arose during the tagging process.

The presence of the tag on the fill pipe of a UST shall be sufficient to notify any person that the UST is ineligible for delivery or deposit.

[23] In general, the zip tie should be placed around the fill pipe. In some cases the diameter of the fill pipe may require staff to use two zip ties to ensure that the tag is secure. If the zip tie cannot be placed around the fill pipe, then it can be placed through the fill cap. Note that if the tie is placed through the cap, then the tank likely cannot be filled for testing without breaking the zip tie.

5.4.9 Delivery Company Notification

Central office staff will maintain a website identifying the Virginia facilities with active red tags along with an email list of delivery companies interested in receiving notifications of delivery prohibition. The OSRR Training Coordinator will send an email to the list members each time a new facility has been added to the active delivery prohibition list. The list will provide the name and location of the facility where the tag(s) has been applied. In addition, if central office or regional staff knows the identity of the delivery company for that facility, they may notify the delivery company directly as a courtesy.

5.4.10 Future Deliveries Prohibited

If staff discovers or suspects that a delivery has been made to a tagged tank, or that a tag has been altered, defaced or removed then staff should notify the Regional Petroleum Programs Manager and central office immediately.

5.4.11 Temporary Removal of the Tag

If an owner/operator wishes to conduct repairs, upgrades, testing or remove or add product that requires the temporary removal of a red tag, the owner/operator must provide a written request (email is sufficient) explaining the testing parameters, the tank systems affected and the amount and type of fuel involved. The request should also include the proposed time and date for the event. Upon written approval by DEQ regional staff in consultation with OSRR, the tag may be temporarily removed to conduct repairs, upgrades, testing or to add or remove product (email approval is sufficient). If approval involves accepting product into the tank to conduct testing, the approval letter must set out the conditions under which the delivery can be made, including the amount of regulated substance that can be delivered into the tank system, the timing of the test and whether the fuel must be removed from the tank after the test.

Staff should only grant permission to receive fuel in circumstances where test results require fuel and other reasonable options are not available. Regional staff may choose to be on site to remove the tag, if necessary, or may authorize the owner/operator or fuel delivery company in the approval correspondence to remove and replace the tag, if necessary, for the limited testing period. If regional staff allow the owner/operator to remove and replace the tag, then staff must supply DEQ approved zip ties along with the approval correspondence. In any event, regional staff must ensure that the tag is reattached after the event is concluded.

5.4.12 Return to Compliance Post IFF:

Regional program staff should review any document submittals from the owner/operator supporting a return to compliance and contact the owner/operator within 5 business days of receipt to communicate whether the documentation is sufficient to confirm a return to compliance. If the documentation is insufficient, staff should outline the deficiencies in writing (email or fax is sufficient) and request the necessary documents to verify return to compliance (see **Appendix-J**). If the documentation is sufficient to verify a return to compliance for any of the USTs at the facility, then the delivery prohibition tag must be removed for those specific USTs that have returned to compliance.

Staff should direct the letter to the party who submitted the documents but should copy all other parties as well. For example, if the owner sent in the documents, staff should address the letter to the owner and copy the operator.

5.4.13 Return to Compliance for Red Tagged Facilities

In assessing return to compliance, program staff should, at a minimum, require the owner of a tagged facility to take the same actions that would be required to return a non-tagged tank to compliance. Return to compliance decisions are fact dependent and may require additional consultation with regional and OSRR staff. OSRR is available to discuss these situations and review previous red tag cases to help the region evaluate whether an owner/operator has provided sufficient documentation to return to compliance.

5.4.14 Delivery Prohibition Tag Removal

Upon concluding that the owner/operator has returned one or all tagged USTs at the facility to compliance, regional staff must return to the facility **within 2 business days** to remove the delivery prohibition tag from the compliant tank(s). Staff should make every effort to remove the tag in person. However, if circumstances prohibit returning to the facility within this time frame (e.g., insufficient staff resources), staff may send a letter to the owner and operator authorizing removal of the delivery prohibition tag (see **Appendix-K**). Staff may fax or email the letter but should follow up by mailing the authorization letter by first class mail. Staff should also notify OSRR's Legal Coordinator, who will request that the OSRR webmaster remove the facility or tank from DEQ's Delivery Prohibition web page. OSRR will also send out an email to subscribing delivery companies notifying them that the tag(s) have been removed from the facility's tank(s).

Once a tag is removed, it should be returned to OSRR.

5.5 Non-expedited Process

For all non-expedited, potential violations of Parts II, III, IV or VI of the UST Technical Regulation or the requirements of the UST Financial Responsibility Regulation, staff must give the owner or operator a reasonable amount of time to correct the deficiency(s) before moving into the delivery prohibition process (see **Appendix-C** for a listing of the compliance issues that warrant a non-expedited delivery prohibition proceeding.).

NOTE: Delivery prohibition cannot be used to address violations of Part VII of the Regulation (failure to close). However, tanks that are not properly closed are subject to the regulatory requirements pertaining to active tanks, such as release detection and corrosion protection requirements, and these potential violations should be included on the inspection report and RCA. Delivery prohibition also should not be used to address a potential violation of Registration or Operator Training requirements unless at least one other potential violation from Appendix-C remains unresolved. Generally, central office staff will address potential violations of the Financial Responsibility Regulation through 1186 proceedings, and delivery prohibition, if necessary.

5.5.1 Initiating the Compliance Process

When integrating delivery prohibition into the standard compliance and enforcement process, regional staff should first follow the process discussed in Section 2 and Section 3 to provide the owner or operator with an opportunity to come into compliance before initiating delivery prohibition.

5.5.2 Initiating the Delivery Prohibition Process

By the time the NOV has been issued, staff generally will have moved through the steps discussed in Sections 2 and 3 (RCA, Warning Letter, etc.) and will have been unsuccessful in obtaining compliance. It is important to document that the owner has been provided ample time and opportunity to return to compliance before proceeding to the delivery prohibition process. After the NOV has been issued, depending on the circumstances, staff may choose to go directly to the delivery prohibition process. In other circumstances, staff may pursue a consent order before utilizing delivery prohibition. If attempts to obtain a consent order fail, it is appropriate to begin delivery prohibition proceedings.

Staff may also choose to pursue both delivery prohibition and a consent order at the same time, or, more commonly, request delivery prohibition in an 1186 proceeding. Pursuing delivery prohibition through an 1186 proceeding offers staff the option to impose a civil penalty as well as delivery prohibition. In situations where the delivery prohibition IFF is combined with an 1186 IFF proceeding, DE staff will coordinate and act as DEQ's advocate at the proceeding. These IFFs tend to be more formal in tone, and the presiding officer does not issue an immediate decision. Instead, the presiding officer will recommend a course of action to the DEQ Director who will sign the final order. After an order is issued, the remaining procedures in this Guidance will apply.

5.5.3 Integrating Delivery Prohibition into the NOV /Consent Order Process

In a typical enforcement action, regional staff generally issue the NOV and hold a meeting within a short time period to discuss the violations and the owner's plan to return to compliance. At this time, staff often present a draft consent order for discussion. Depending on the circumstances of the case, DEQ's goals, and the most effective means to meet those goals, staff may choose to pursue either the consent order or the delivery prohibition process, or staff may pursue both concurrently.

If staff pursue a consent order first, staff should explain to the owner that delivery prohibition is a tool that could be pursued at a later date if the alleged violations remain unresolved. If staff decide to pursue delivery prohibition before entering the consent order process, then it is also appropriate to explain to the owner that the delivery prohibition process does not prevent a consent order at a later date.

If staff pursue delivery prohibition first, staff may streamline the process, by providing a Notice of Delivery Prohibition Proceedings to the owner and operator[24] during the NOV meeting and then hold the delivery prohibition IFF at a later date. Staff may also provide the Notice by mail after holding the NOV meeting. Under some limited[25] circumstances, staff may wish to provide the Notice prior to the NOV meeting and hold the Delivery Prohibition IFF during the NOV meeting. If staff choose this approach, staff must be sure to provide both the owner and operator with the Notice before the meeting.

[24] Owners are generally pursued first for compliance in the UST program. However, once delivery prohibition proceedings are initiated, the operator must be included in all correspondence and become a party to all delivery prohibition proceedings.

[25] This option is appropriate when the owner has a history of non-compliance, has multiple non-compliant facilities or has been unresponsive.

NOTE: In some cases (see Section 3), staff may choose to move directly to a Notice of Violation without first issuing a Warning Letter. In this circumstance, it is not appropriate to move directly into the delivery prohibition process at the NOV meeting, as described above. The owner and operator should be given a reasonable opportunity to comply before initiating delivery prohibition proceedings.

If staff have issued an NOV and the owner has failed to respond within the time prescribed in the NOV, either to propose a schedule for returning to compliance or set a meeting date, staff can initiate the delivery prohibition process. This applies regardless of whether a Warning Letter was issued before the NOV.

5.5.4 Central Office Coordination

On the regular process track, regional staff **must** email Delivery Prohibition candidates to the OSRR Legal Coordinator and the Central Office Tank Enforcement Manager for review and consultation. Staff may submit an Enforcement Recommendation and Plan if one has been drafted or staff may send an email that identifies the facility name and ID number, the inspection date, the alleged violations, the identity of the owner and operator, and a brief summary of the case with a chronology. Regional office staff should obtain any required regional concurrence/approval before proposing the candidate to OSRR. Central office will review and confer on whether to proceed with the delivery prohibition process. If central office concurs that delivery prohibition is suitable, OSRR will communicate this to the region via email. If central office disagrees, OSRR will communicate that decision along with the rationale for disagreement. In such cases, delivery prohibition will not proceed. OSRR will copy DE on all decisions and the Land Protection & Revitalization Division Director on decisions that concur with pursuit of delivery prohibition.

5.5.5 Delivery Prohibition Process

Once staff have mailed or hand delivered the Notice of Delivery Prohibition Proceedings to the owner and operator identifying the potential delivery prohibition violation(s) and scheduled the meeting, the delivery prohibition process will follow the steps outlined in the Expedited Process section above.

NOTE: In most, if not all, cases where staff identify “not equipped to comply” violations during an inspection, staff will also find other violations. This means that staff generally will be proceeding down two separate tracks to address all of the violations identified at the facility, i.e., expedited delivery prohibition to address the “not equipped to comply” type violations

and the normal compliance/enforcement process to address other violations identified at the same inspection.

5.6 Facility-wide Delivery Prohibition

9VAC25-580-370(F) provides that the board, after Notice and a Delivery Prohibition IFF, may classify all USTs at a facility as ineligible for delivery if one or more tanks has been so classified for more than 90 days. Staff should consider utilizing this provision when the owner/operator has made no attempt to return the tagged tank(s) to compliance for more than 90 days and the tagged tank(s) poses an imminent risk to the environment. What constitutes an imminent risk is fact specific and will be handled on a case-by-case basis in consultation with central office. Again, staff must hold another IFF to establish that one or more tagged tanks at the facility has not returned to compliance before the remaining regulated tanks at the facility can be tagged.

5.7 Emergency, Rural or Remote Exception

9VAC25-580-370(I) provides that if the board determines that a delivery prohibition violation exists, it can consider whether the threat posed by the violation is outweighed by the need for fuel from those USTs to meet an emergency situation or to meet the needs of a rural and remote area. If the board finds that such a condition outweighs the immediate risk of the violation, the board may defer imposition of delivery prohibition for up to 180 days. In every such case the director shall consider (i) issuing a special order under the authority of subdivision 10 of § 10.1-1186 of the Code of Virginia prescribing a prompt schedule for abating the violation and (ii) imposing a civil penalty.

If staff suspects that these circumstances exist, staff should consult with central office before proceeding. In addition, the boilerplate Notice (see **Appendix-D**) will require any owners/operators who seek to request this exception to raise it during the Delivery Prohibition IFF.

6 Subsequent Inspections at Red Tagged Facilities[26]

Once delivery prohibition has been imposed at a facility, it is appropriate to increase the inspection frequency for those facilities that have recently been tagged and returned to compliance and those that have recently been tagged and remain tagged. This section also details appropriate compliance follow-up activities for these classes of facilities.

6.1 Operating Facilities/Businesses where red tags remain on the tanks

A facility with one or more red tagged USTs may still remain in operation by:

1. Selling the remaining fuel in tagged tanks;
2. Selling fuel from tanks at the facility that are not tagged; or
3. Continuing to run a business on the property (e.g., the convenience store) until the tagged tanks can be returned to compliance and begin dispensing fuel again.

Inspection frequency and follow-up:

Staff should perform a site visit at these operating facilities within 3 to 6 months after attaching the tags to ensure that the tags are still attached. If any of the tags have been removed or there is information to suggest that fuel has been added to any tagged USTs without permission, the inspector should immediately report this to the regional Petroleum Programs Manager and to OSRR.

Staff can expand the site visit to a formal inspection if they observe other potential noncompliance issues that would merit an RCA. In this case, staff should initiate compliance follow up in conformance with Section 3 and notify the enforcement staff involved with the delivery prohibition proceeding of the new compliance issues. If the inspector does discover new compliance issues, staff may choose to make a second follow up site visit at their discretion, resources allowing. If staff do not discover additional issues during the site visit, or the gravity of the issues is slight, then the inspection frequency should continue within the existing 3 year cycle.

[26] Regional staff, at their discretion, may want to increase inspection frequency and follow this subsequent inspection guidance for other facilities, such as those that have returned to compliance through a consent or unilateral order.

6.2 Operating Facilities/Businesses that have returned to compliance with tags removed

Inspection frequency and follow-up:

Staff should perform a site visit within 6 to 12 months following the removal of the tag(s) to inspect for items that were found in violation during the red tag proceeding. If staff discover new compliance issues, staff should expand the site visit to a formal inspection and issue a new RCA. However, if some or all of the potential noncompliance includes some or all of the issues that resulted in delivery prohibition, and the owner/operator is the same, staff should issue an NOV and refer the case to enforcement.

If the inspector does discover new compliance issues, staff may choose to make a second follow up site visit at their discretion, resources allowing. If staff do not discover additional issues during the site visit, or the gravity of the issues is slight, then the inspection frequency should continue within the existing 3 year cycle.

6.3 Non-operating Facilities where tags remain on the tanks

A facility is "Non-operating" if the owner/operator is no longer operating the tanks or dispensing fuel at the facility, and has not evidenced any intent to do so in the future.

Inspection frequency and follow-up

The inspection frequency at a non-operating facility with tagged tanks will depend upon whether the inspector has reason to believe the facility may come back into operation (e.g., the facility is in a marketable area and generally experiences high ownership turnover).

- For those facilities that may come back into operation, staff should visit the site within 12 months to ensure the tags remain in place. If the tags are still in place, then staff can place the facility back into the existing 3 year inspection cycle[27].

- For those facilities that appear to be abandoned and unlikely to come back into operation (e.g., no dispensers, remote location, etc.), staff should inspect on the normal 3 year cycle. Inspectors should only rarely encounter this type of tagged facility.

[27] Staff may also consider alerting the locality that the tanks at the facility have been tagged. The fire department, the planning and zoning department, the building inspections department and the economic development department may all have a stake in the future of the site and may use the red tag information in their planning and permitting processes. If the locality is aware of the tagged tanks, it may take this into consideration and encourage compliance as it processes application, permit and incentive requests.

Delivery Prohibition is rarely used for these types of facilities due to the amount of time and resources involved.

If any of the tags have been removed or fuel has been added to any tagged USTs without permission, or the facility is in operation again, the inspector should immediately report this to the regional Petroleum Programs Manager and to OSRR.

Occasionally, inspectors may find that tagged tanks at non-operating facilities are out of compliance with other requirements. An example is a facility with tanks that remain tagged for release detection but sometime later are overdue for a corrosion protection test. In these cases, the inspector should send a letter to the owner outlining the noncompliance and stating that the issues should be addressed before bringing the tanks back into service. The inspector should then put a copy in the file and administratively close the compliance case in CEDS. (See **Appendix-L** for boilerplate letter).

Appendix-A Sample Initial Contact Letter to Landowner

[date]

[Landowner Name and Address]

RE: USTs at [facility name and facility address]

[Facility ID #]

Dear :

On [date], a Department of Environmental Quality (DEQ) inspector visited the above-referenced facility to determine the compliance status of the underground storage tanks (USTs). The results of the inspection are attached. [Describe any information known regarding the status of the registered owner.]

Pursuant to 9VAC25-580-70 of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[28] (UST Regulation), "…Any change in ownership, tank status…requires the UST owner to submit an amended notification form within 30 days after such change…" To date, DEQ has not received information required by state regulations to be submitted when a UST undergoes ownership transfer and temporary or permanent closure.

USTs that are no longer in use should be placed into temporary closure or permanently closed. Part VII of the UST Regulation, Out of Service UST Systems and Closure, outlines specific requirements for the temporary and permanent closure of USTs.

9VAC25-580-310 which addresses temporary closure states:

- A permit must be obtained from the local building official prior to the temporary closure;
- Owners and operators must continue operation and maintenance of corrosion protection in accordance with 9VAC25-580-90 and any release detection in accordance with Part IV. *(Release detection is deferred if the product level is below one inch);*
- When a UST system is temporarily closed for more than three months, owners

[28] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at Chapter 580 .

and operators must leave vent pipes open and functioning and cap and secure all other lines, pumps, manways and ancillary equipment;

- When a UST system is temporarily closed for more than twelve months, owners and operators must permanently close the UST system if it does not meet either performance standards in 9VAC25-580-50… or 9VAC25-580-60. Owners and operators must permanently close the substandard UST systems at the end of this twelve month period in accordance with 9VAC25-580-320 through 9VAC25-580-350, unless the building official grants an extension of the twelve months closure period. Owners and operators must complete a site assessment in accordance with 9VAC25-580-330 before an extension can be applied for. *(If corrosion protection of the tanks is adequately maintained, the tanks may be placed in temporary closure indefinitely.)*

Pursuant to 9VAC25-580-320 of the UST Regulation, the following requirements must be met when a UST is permanently closed:

- A permit must be obtained from the local building official prior to the closure;

- A site assessment must be performed in accordance with 9 VAC 25-580-330;

- The tank must be emptied and cleaned by removing all liquids and accumulated sludges, and either removed from the ground or filled with an inert, solid material (e.g. cement slurry, sand);

- Within 30 days after the completion of the closure, a 7530-2 UST Notification Form must be submitted to DEQ reflecting the closure of the tank.

A site assessment generally consists of soil or water samples being taken around the immediate vicinity of the excavated UST and piping, in the area where a release is most likely to be detected, to determine the level, if any, of total petroleum hydrocarbons in the soil or water. Samples must be analyzed using EPA or DEQ approved methods. Results from vapor or groundwater monitoring performed in accordance with 9VAC25-580-160 are acceptable in lieu of soil or ground water samples during UST closure. The results of the site assessment, along with a site map detailing the UST system, buildings and roads, the sample or monitoring locations, and any other important features, must be submitted to DEQ along with the 7530-2 UST Notification Form. Please refer to 9VAC25-580-320 and 9VAC25-580-330 of the UST Regulation.

In addition, the locality where the tanks are located may have building and/or fire codes that require the tanks to be emptied.

As the real property owner you may have ownership liability with regards to these tanks. Please be aware that if these tanks contain fuel, and the tanks begin to leak, your property and possibly your neighbors' properties could become contaminated. If that occurs, state law requires cleanup measures to be conducted.

If you hold title to the property as a foreclosing lender then you may be entitled to a lender liability exemption to storage tank compliance and cleanup requirements. You may download the lender liability exemption guidelines at http://www.deq.virginia.gov/Portals/0/DEQ/Land/Tanks/lendrleg.pdf.

Please respond to this letter by contacting [inspector name] at ### or [email address] no later than [date], indicating what actions may already have been taken, or what actions you plan to take to return the tanks to compliance or close the tanks. If you contend that you are not the tank owner then please submit documentation to support that assertion.

Sincerely,

[name]

Petroleum Programs Manager

Enclosure

cc: Compliance File

Local Fire Marshal

Appendix-B Letter to Landowner Closing Compliance Case

[date]

[Name and address]

Re: Underground Storage Tanks located at [facility address]
[Facility ID #]

Dear :

By letter dated [date], the Department of Environmental Quality (DEQ) requested that you take certain actions to bring the petroleum underground storage tanks ("USTs") located on your property into compliance with the UST Technical Regulation (9VAC 25-580). To date, DEQ has not received any documentation to indicate the tanks are in compliance with the Regulation or have been properly closed.

This is to advise you that DEQ's database has been changed to indicate the regulated USTs on the property are permanently out of use, however proper closure documentation was not submitted, which could result in enforcement action. The compliance action remains unresolved in our database.

For your information, our database and files are frequently reviewed by prospective purchasers, insurers, and lenders during property transfers and refinancing. The presence of noncompliant petroleum storage tanks on your property may impact a future sale or refinancing action. Further, if these tanks contain fuel and the tanks begin to leak, your property and possibly your neighbors' properties could become contaminated. If that occurs, state law requires cleanup measures to be conducted, and you may incur liability to other parties for damage caused by the contamination.

Please call me at [####] if you have any questions.

Sincerely,

Petroleum Programs Manager

Appendix-C Underground Storage Tank Delivery Prohibition Decision Matrix[29]

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (to be interpreted broadly – read "All other violations, for example…")
Spill Prevention		
Spill Buckets/Spill Containment	▪ Not installed	▪ Collar not seated around fill port ▪ Cracked or damaged
Overfill Prevention		
Ball Float	▪ Not installed (i.e., not able to be observed or verified via owner certification on 7530 or installation records by inspector)	▪ Not functioning (broken ball/cage)
Automatic Shutoff	▪ Not installed	▪ Improperly installed ▪ Not functioning (flapper works but bent, etc.)
Alarm	▪ Not installed	▪ Installed in a manner that impedes proper functionality ▪ Not functioning (alarm is not visually accessible or audible to delivery driver, does not always work, needs repair)
Corrosion Protection		
Galvanized or Bare Steel Tank/Piping (including Sti-P3 tanks)	▪ No Cathodic Protection installed ▪ CP (impressed current) verified to have been turned off more than 180 days AND no recent integrity assessment has been performed.	▪ 3-yr. testing not documented/failed test ▪ Flex connectors buried in soil and/or gravel (i.e. need to be unburied, CP or boot) ▪ Impressed current CP 60 day rectifier reading records missing ▪ No CP on tank manifold siphon bar ▪ CP (impressed current) turned

[29]This Matrix is based on a narrow interpretation of Section 370 of the Regulation to identify a manageable subset of circumstances that would benefit most from immediate action. As the agency and the regulated community gain experience with the delivery prohibition process and its application, the Matrix may be modified to expand the list of violations which warrant the expedited process. Nothing in this Table is intended to conflict with the information contained in the DEQ Petroleum Storage Tank Compliance Manual (2001).

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (to be interpreted broadly – read "All other violations, for example…")
		off for less than 180 days ▪ Violations of tank lining reqts
Release Detection (Tank)		
Inventory Control + TTT	▪ No data collected AND no precision tank tightness test AND no stick or measuring device	▪ Equipment not calibrated, damaged or not functional (e.g., stick too short or damaged) ▪ Not reconciled to 1%+130 gallons ▪ Method expired (e.g., > 10 years) ▪ Weekly stick readings only
Manual Tank Gauging	▪ No data collected AND no precision tank tightness test (if applicable) AND no stick or measuring device	▪ Criteria for method not followed (e.g. incorrect math) ▪ Tank >2,000 gallons (invalid method) ▪ Method expired (e.g., > 10 years) ▪ Conducted only once per month
ATG	▪ No console control box OR no probe	▪ Unplugged ▪ Not programmed correctly ▪ Damaged or malfunctioning probe ▪ Broken printer
Vapor Monitoring	▪ No monitoring well OR no vapor detecting or measuring device	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Groundwater Monitoring	▪ No monitoring well OR no detecting or measuring device	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Interstitial Monitoring	▪ Interstitial Monitoring has no control box, sensor, or measuring device	▪ Criteria for method not followed ▪ Equipment damaged ▪ Unplugged device ▪ Not performed for tanks installed after 9/15/10
Statistical Inventory Reconciliation (SIR)	▪ No measuring device (stick/probe) AND no paid vendor contract AND no data collected	▪ Criteria for method not followed ▪ Records missing ▪ Failed results

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (To be interpreted broadly—read "All other violations" for example)
Release Detection - Pressurized and Gravity Fed Piping		
Automatic Line Leak Detector (ALLD) + Annual Line Test	▪ No ALLD present	▪ Line test not documented ▪ ALLD not programmed correctly ▪ ALLD (mechanical) not tested ▪ No records
ALLD + ATG/LLD	▪ No ALLD present	▪ ATG unplugged or not programmed correctly ▪ ALLD (electronic) not tested in accordance with manufacturer's requirements ▪ No records
ALLD + Vapor Monitoring	▪ No ALLD present OR no monitoring well	▪ Criteria for method not followed (e.g., site assessment not performed) or no records ▪ ALLD (mechanical) not tested
ALLD + Groundwater Monitoring	▪ No ALLD present OR no monitoring well	▪ Criteria for method not followed (e.g., site assessment not performed) or no records ▪ ALLD (mechanical) not tested
ALLD + Interstitial Monitoring	▪ No ALLD present OR no sump sensors (and visual monitoring is not an option)	▪ Criteria for method not followed or no records ▪ ALLD (mechanical) not tested ▪ Interstitial monitoring not performed for piping installed after 9/15/10[30]
ALLD + SIR	▪ No ALLD present ▪ No measuring device (stick/probe) AND no paid vendor contract AND no data	▪ Criteria for method not followed ▪ Records missing ▪ ALLD (mechanical) not tested

[30] Interstitial monitoring is required for newly installed piping or greater than 50% of piping has been replaced.

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (To be interpreted broadly—read "All other violations" for example)
Release Detection Unsafe Suction Piping – Regulated		
Line Tightness Testing	▪ No record that precision line tightness test was ever performed	▪ Criteria for method not followed ▪ Precision line tightness test exceeds 3 years
Vapor Monitoring	▪ No monitoring well OR no records	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Groundwater Monitoring	▪ No monitoring well OR no records	▪ Criteria for method not followed (e.g., site assessment not performed) ▪ Equipment damaged
Interstitial Monitoring	▪ No line/sump sensors AND visual monitoring is not an option	▪ Criteria for method not followed ▪ Results recorded greater than every 30 days
SIR	▪ No measuring device AND no paid vendor contract AND no data	▪ Criteria for method not followed ▪ Records missing
Secondary Containment		
		▪ New single-walled tank installed on or after 9/15/10 OR ▪ Entirely new single-walled piping installed on or after 9/15/10 OR ▪ Single-walled piping replaced greater than 50% of original piping on or after 9/15/10 ▪ Not performing interstitial monitoring for tank/piping systems installed on or after 9/15/10 ▪ Failure to install a dispenser pan when required

Regulatory Requirement	Expedited Process Violations (to be interpreted narrowly)	Regular Process Violations (To be interpreted broadly—read "All other violations" for example)
Registration[31]		▪ Failure to register ▪ Failure to amend registration
Operator Training[32]		▪ Failure to obtain or provide records for Class A, Class B, or Class C training. ▪ Failure to provide written emergency response procedures ▪ Failure to post emergency response procedures (unmanned facilities only)
Financial Responsibility[33]		▪ Failure to demonstrate financial responsibility or maintain current financial responsibility documentation
Suspected Release Confirmation	▪ Failure to investigate or confirm	▪ Improper investigation or low risk area

[31]Potential registration noncompliance should only be included in a delivery prohibition Notice if there is at least one other violation (excluding operator training).

[32] Potential Operator Training noncompliance should only be included in a delivery prohibition Notice if there is at least one other potential violation (excluding registration).

[33] Potential violations of the Financial Responsibility Regulation (9VAC 25-590) generally will be addressed by Central Office staff. In the rare case where the region may be pursuing compliance for financial responsibility, these types of potential violations should only be included in a delivery prohibition Notice if there is at least one other potential violation (excluding registration and operator training).

Appendix-D Notice of Delivery Prohibition Proceedings (Informal Fact Finding Proceeding)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility name, address, VA.]
[Facility ID]

Dear xxxxx:

You are hereby notified that, pursuant to § 2.2-4019 of the Code of Virginia ("Va. Code"), the State Water Control Board, (the Board) acting through the Department of Environmental Quality (DEQ or the Department), will conduct an Informal Fact Finding Proceeding on [xxxxx at xxx a.m./p.m.]. The purpose of the Proceeding is to determine whether the underground storage tank(s) (USTs) located at this facility and listed in this Notice are ineligible for delivery, deposit, or acceptance of a regulated substance based on violation(s) of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation,[34] (the Regulation) as described below.

This letter notifies you of information upon which DEQ may rely to make a case decision in this matter. In addition to the information provided with this Notice, DEQ may rely on any documents and information in the Department's file on this matter, along with the applicable law and agency precedent. The files are public documents and are available for your inspection at the DEQ's [xxx] Regional Office located at [address] or you may request a copy of the file be sent to you via email or regular mail.

OBSERVATIONS AND LEGAL REQUIREMENTS

On [date], DEQ staff conducted an inspection of the UST(s) at [facility address]. File and UST registration documents were also reviewed. A copy of the Request for Corrective Action [and/or

[34] 9VAC25-580-10 *et seq*. The Regulation can be found at: Chapter 580.

Inspection Report] is enclosed, which describes the staff's factual observations and identifies the applicable legal requirements.

These potential violations remain unresolved and will be the subject of the Proceeding:

[Use the Observations and Legal Requirements format used for Warning Letters and Notices of Violation to list potential violations and identify which UST(s) are implicated]

PROCEDURES

DEQ will conduct the Informal Fact Finding Proceeding before [Name of Presiding Officer], an employee of DEQ. You may appear in person or by counsel or other qualified representative to present factual data, argument, or proof in connection with this case. DEQ may rely on the enclosed documents to substantiate the alleged violations, as well as other documents in its files.

[Name] will represent DEQ at this Proceeding. Based upon DEQ's file and the record of this Proceeding, DEQ will be requesting that the Presiding Officer find that the referenced UST(s) at [facility name] are in violation of the Regulation and ineligible for delivery, deposit or acceptance of a regulated substance based on 9VAC25-580-370 of the Regulation.[35]

RESOLUTION

Please contact [Inspector] at [(xxx) xxx-xxxx] if you wish to resolve the potential violations prior to the Informal Fact Finding Proceeding. If you complete the necessary work to resolve the potential violations prior to the date of the Proceeding, contact [Inspector name] immediately so that compliance can be verified. You must provide a written report and appropriate documentation demonstrating that compliance has been achieved 3 business days prior to the Proceeding. If compliance is verified, the Proceeding will be cancelled and the UST(s) will be eligible for receipt of a regulated substance. If compliance is not verified, the Proceeding will go forward as scheduled.

You may waive your right to an Informal Fact Finding Proceeding by submitting a request for waiver prior to the date of the Proceeding. The request shall be in writing and signed by the owner of the UST and include a statement that no material facts are in dispute and that the owner waives his right to an Informal Fact Finding Proceeding and to any other administrative proceeding regarding the potential violations described herein.

[35] You may request to be heard on the Emergency, Rural or Remote Exception. 9VAC25-580-370(I) provides that if the Presiding Officer, acting on behalf of the Board, determines that a delivery prohibition violation exists he or she can consider whether the threat posed by the violation is outweighed by the need for fuel from the UST(s) to meet an emergency situation or to meet the needs of a rural and remote area. If it is determined that such a condition outweighs the immediate risk of the violation, the Presiding Officer may defer imposition of delivery prohibition for up to 180 days. In every such case the director shall consider (i) issuing a special order under the authority of subdivision 10 of § 10.1-1186 of the Code of Virginia prescribing a prompt schedule for abating the violation and (ii) imposing a civil penalty.

FUTURE ACTIONS

If you waive your right to an Informal Fact Finding Proceeding or if these tanks are determined to be in violation of 9VAC25-580-10 *et seq*. and ineligible for delivery, a delivery prohibition notice ("red tag") will be placed on the fill port of the ineligible UST(s) and delivery, deposit or acceptance of a regulated substance into the UST(s) will be prohibited until such time as the UST(s) are returned to compliance. Please be advised that removal of the red tag is prohibited by 9VAC25-580-370 unless authorized, in writing, by DEQ. In addition, for each alleged violation, DEQ is authorized to pursue enforcement actions, seek civil penalties and seek compliance with its rules and regulations in any manner allowed by law.

Please contact [Name of Presiding Officer] within 5 business days of the date of this letter to confirm whether you and/or a representative will attend the Proceeding or with any questions relating to this Proceeding. [He/she] can be reached at [(xxx) xxx- xxxx.]

Please note that unless the potential violations are resolved or the owner waives his right to an Informal Fact Finding Proceeding, the Informal Fact Finding Proceeding will be held regardless of whether you or your representative chooses to attend.

Sincerely,

Regional office

Enclosures

cc: Presiding Officer
RO Agency Advocate
OSRR Director
RO Petroleum Programs Manager
Tank Enforcement Manager

Appendix-E Waiver of Delivery Prohibition Informal Fact Finding Proceeding

[DEQ CONTACT]
[DEQ RETURN ADDRESS]

RE: Waiver of Informal Fact Finding Proceeding Concerning Delivery Prohibition
[Facility Name]

I, [UST OWNER and/or OPERATOR], certify that I am the [owner or operator] of the [UST # or UST SYSTEM] located at [ADDRESS] and that I have been given notice of an informal fact finding proceeding to be held in accordance with Va. Code §2.2-4019 to determine whether [UST # or UST SYSTEM] shall be ineligible for delivery, deposit, or acceptance of a petroleum product or other regulated substance pursuant to 9VAC25-580-370.

I, [UST OWNER or OPERATOR], acknowledge that there are no material facts in dispute with respect to the alleged violations as identified in the proceeding notice and hereby waive my right to an informal fact finding proceeding and to any other administrative proceeding regarding the imposition of delivery prohibition on [UST# or UST SYSTEM].

I, [UST OWNER or OPERATOR], understand that as a result of this waiver, the Department of Environmental Quality will make a finding to impose delivery prohibition, and shall affix a red tag to the fill pipe of [UST # or UST SYSTEM] prohibiting delivery, deposit, or acceptance of a petroleum or other regulated substance.

I, [UST OWNER or OPERATOR], understand that no person shall deliver to, deposit into, or accept a petroleum product or other regulated substance into [UST # or UST SYTEM] unless authorized in writing by the Department of Environmental Quality and that no person shall alter, deface, remove, or attempt to remove the red tag that prohibits delivery, deposit, or acceptance of a petroleum product or other regulated substance to [UST# or UST SYSTEM] until such time as there is a return to compliance.

_____

[OWNER NAME / DATE **or** OPERATOR NAME/ DATE]
[FACILITY NAME]
[FACILITY ADDRESS]

Appendix-F Delivery Prohibition Return to Compliance Letter (pre-Informal Fact Finding)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Termination of Delivery Prohibition Proceedings

Dear [owner and operator]:

On (DATE), the Department of Environmental Quality (DEQ), staff conducted an inspection of the underground storage tank(s) (USTs) at (FACILITY ADDRESS). Staff also reviewed file and UST registration documents. Staff's factual observations and the applicable legal requirements were identified in the Notice of Delivery Prohibition Proceedings that was issued on (DATE).

On [DATE], the [name of owner or operator] submitted supporting documentation to demonstrate that the alleged violation(s) rendering the UST(s) ineligible for delivery have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff agrees that the alleged violation(s), has/have been resolved.

Accordingly, the delivery prohibition proceeding initiated to address these alleged violations is terminated and the Informal Fact Finding Proceeding scheduled for [insert date of IFF] is cancelled.

Please note that if DEQ discovers violations at this facility as a result of a future inspection or site visit, the UST(s) may again be subject to the delivery prohibition process at that time. Further, this letter has no bearing on any other enforcement actions that may be pending at this facility.

Please contact me at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-G Delivery Prohibition Insufficient Documentation Letter (pre Informal Fact Finding)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Insufficient Documentation Notice

Dear [owner and operator]:

On (DATE), the Department of Environmental Quality (DEQ), staff conducted an inspection of the underground storage tank(s) (USTs) at (FACILITY ADDRESS). Staff also reviewed file and UST registration documents. Staff's factual observations and the applicable legal requirements were identified in the Notice of Delivery Prohibition Proceedings that was issued on (DATE).

On [DATE], the [name of owner or operator] submitted supporting documentation to demonstrate that the alleged violation(s) rendering the UST(s) ineligible for delivery have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff does not agree that the alleged violation(s) has/have been resolved. The following items remain unresolved:

Note: include list of work to be done.

Please submit additional documentation demonstrating that this work has been completed to [inspector name and address] [staff can specify what documentation is necessary, if preferred]. If you wish to resolve the potential violations prior to the Informal Fact Finding Proceeding, contact [Inspector name] immediately so that compliance can be verified. You must provide the appropriate documentation demonstrating that compliance has been achieved 3 business days prior to the Proceeding. If compliance is verified, the Proceeding will be cancelled and the UST(s) will be eligible for receipt of a regulated substance. If compliance is not verified, the Proceeding will go forward as scheduled.

Please contact [inspector name] at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-H Delivery Prohibition Advocate Checklist

Exhibits to submit at the Informal Fact Finding (IFF):

Inspection Report(s) (along with inspector's explanation/observations and photos if violations are unclear). Photos should be numbered to match observations.

Any compliance documentation that confirms/refutes violations or compliance (test reports, job invoices, contracts to perform work, certifications, etc.)

Any compliance letters/notices from DEQ to the Responsible Person(s) (RP) (Deficiency Letter, RCA, Warning Letter, NOV, TCA/LOA, etc.)

Copies of any responses from the RP to DEQ (including phone logs, emails, etc.)

Copies of the Notice for referral for Delivery Prohibition Hearing (including any delivery confirmation if tank owner is not present)

Number all submittals and place in an Exhibit Book with a copy for the presiding officer and a copy for the owner and/or operator for ease of reference during the IFF.

Ownership documentation

Advocate Presentation:

First: Opening Statement: The advocate should introduce himself or herself, state his or her position, and indicate that they are presenting on behalf of the Department.
The advocate should provide a brief history of delivery prohibition. Provide Federal law requirements supporting VA's UST regulation and include references to the recent Federal law requiring delivery prohibition for non-compliant USTs. Also refer to the APA, 2.2-4019, as authority to hold the IFF.

Sample Opening Statement:

Personal Introduction.

The federal Energy Policy Act of 2005 and DEQ regulations make it unlawful to deliver to, deposit into, or accept a regulated substance into an underground storage tank that has been determined by the US Environmental Protection Agency or the Virginia DEQ to be ineligible. Tanks that are in violation of certain pollution prevention and corrective action requirements are ineligible to receive deliveries of regulated substances. The purpose of this informal fact finding proceeding is to determine whether any USTs at this facility are non-compliant and thus ineligible for delivery, deposit, or acceptance of petroleum or other regulated substance.

Second: Describe the inspection(s) at the facility and provide the following info:

- the non-compliant UST(s) (substance stored, whether it is compartmentalized, tank number(s), tank capacity, etc.),
- the address of the UST facility,
- the tank owner and operator for the UST facility,
- the landowner,
- if the tanks are currently being used in operation of the facility or if the tanks are not currently in use, and
- if the tank owner and/or operator is not present, describe what actions were taken to provide notice to the owner/operator.

Third: Describe the compliance and enforcement history at the site. This will be especially relevant in the case of "Regular process" violations.

Fourth: Recite the alleged violation(s) and regulatory citations noted for each UST(s) and provide the supporting observations and/or documentation for each alleged violation. If more than one UST is included, review the alleged violations for each tank separately because a determination regarding the application of a red tag will be made individually for each tank identified in the Notice. Identify and discuss only the alleged violations specified in the Notice during the presentation.

Identify corresponding exhibits in the Exhibit Book when providing the supporting observations.

Note: You may choose to merge the third and fourth steps during your presentation.

Fifth: **Ask the Presiding officer to accept all documents into the records and to authorize use of delivery prohibition for each non-compliant UST.**

Owner/Operator makes presentation

Presiding Officer Asks Questions

Advocate's Sample Closing Statement:

DEQ has presented facts that prove that certain violations of the UST Regulation exist at this facility: [cite regulatory section and applicable tank numbers for each alleged violation]. Furthermore, it is DEQ's position that the described violations render tanks
#[ ] ineligible for delivery of regulated substances, including petroleum. I request that you find that these tanks are subject to delivery prohibition and are ineligible for delivery of petroleum due to their non-compliance and that you require a tag to be placed on the ineligible tank(s).

Optional addition to the presentation regarding the Emergency, Rural or Remote Exception **(if applicable)**:

> 9VAC25-580-370(I) provides that if the Presiding Officer determines that a delivery prohibition violation exists it can consider whether the threat posed by the violation is outweighed by the need for fuel from the UST(s) to meet an emergency situation or to meet the needs of a rural and remote area. In this case such an exception should be granted because…
> If the Presiding Officer finds that this condition outweighs the immediate risk of the violation, the Presiding Officer may defer imposition of delivery prohibition for up to 180 days.

Appendix-I Decision and Notice of Delivery Prohibition

DEPARTMENT OF ENVIRONMENTAL QUALITY
Molly Joseph Ward
Secretary of Natural Resources

David K. Paylor
Director

DECISION AND NOTICE OF UNDERGROUND STORAGE TANK (UST) DELIVERY PROHIBITION

Date: _____

❑ Certified Mail or Delivery Conf. #: _____Facility ID No.:_____

Facility Name: _____

Facility Address: _____

UST Owner: _____

UST Owner Address: _____

UST Owner Phone No.: Fax No.: _____

UST Operator: _____

UST Operator Address: _____

UST Operator Phone No.: Fax No.: _____

On or about _____(date)_____, the State Water Control Board (SWCB), acting through the Virginia Department of Environmental Quality (DEQ), held an informal fact finding proceeding (IFF) to review the potential violations observed during an inspection of this facility on (date)_____. The Proceeding was held to determine whether any of the USTs at the facility, which are owned by (owner name)_____ and operated by _____(operator name)_____ are in violation of any regulatory requirements contained in the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation (the Regulation) that would trigger delivery prohibition pursuant to section 25-580-370 of the Regulation. I , [Presiding Officer], have been appointed to make this determination.

Having reviewed the evidence presented at the Proceeding, I find that the following violation{s} noted during the inspection subject the USTs identified below to delivery prohibition status as specified in 9VAC25-580-370:

[In this space, the Presiding Officer should list out the violations that apply and the tanks to which they apply. The tanks should be identified by the DEQ tank number. Contact OSRR for sample language and format.]

You are hereby notified that no later than 5 business days from the date of this decision, DEQ staff will affix a tag to the fill pipe of the UST(s) listed below which will specify that the UST(s) are ineligible for delivery, deposit, or acceptance of a regulated substance.

Depositing or allowing deposit of a regulated substance into any of the tanks listed below or removing the delivery prohibition tag without prior DEQ approval constitutes a violation of 9VAC25-580-370 and may subject the violator to enforcement action.

Red Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored	Red Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored

You are further notified that the delivery prohibition tag will not be removed until the owner or operator of this facility makes the appropriate system repairs or upgrades, or remedies the stated noncompliance and provides a written report and appropriate documentation demonstrating that compliance has been achieved. Please provide your written report and documentation to (Inspector name, address and phone) _____. Staff will review the documents within 5 business days; if the documentation is insufficient, staff will outline the deficiencies in writing. Within 2 business days of confirming that one or more of the tagged USTs at the facility has been returned to compliance, DEQ staff, or the owner or operator if authorized in writing by DEQ, will remove the delivery prohibition tag and restore the status of the UST as acceptable for delivery of regulated substances.

DEQ may temporarily authorize an owner or operator to accept a limited amount of fuel into an ineligible UST if such activity is necessary to test or calibrate the UST(s) or dispenser system. Please contact _____ _____(Inspector name, phone)_____ to submit this request.

For each violation described herein, or any other violation discovered during this inspection, DEQ reserves the right to issue enforcement actions and seek civil charges and the right to seek compliance with its rules and regulations in any manner allowed by law, and nothing herein shall be construed to preclude the right to seek such civil charges and compliance.

TIME FOR FILING A NOTICE OF APPEAL

This is a final case decision of the SWCB. If you wish to file a judicial appeal of this decision, Virginia Supreme Court Rule 2A:2 requires that you file a Notice of Appeal with the Director of the Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219 within 30 days of the date the final case decision was served upon you (33 days if service was accomplished by mail). This Notice of Appeal does not constitute an appeal to the Director; rather, it provides the legally required notice to the agency secretary that you intend to file an appeal in court. The Administrative Process Act and the Rules of the Supreme Court of Virginia contain other requirements that apply to such a judicial appeal.

_____	_____	_____
Presiding Officer Signature	Phone No.	Date

If hand-delivered:

_____	_____
Received By: Signature	Print Name
_____	_____
Received By: Signature	Print Name

Appendix-J Delivery Prohibition Insufficient Documentation Letter (post decision)

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Insufficient Documentation Notice

Dear [owner and operator]:

On [DATE], the Department of Environmental Quality (DEQ), acting on behalf of the State Water Control Board, held an Informal Fact Finding Proceeding in accordance with 9VAC25-580-370. The purpose of the Proceeding was to determine whether the underground storage tank(s) (USTs) at this facility were ineligible for delivery, deposit, or acceptance of a regulated substance based on violation(s) of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[36] 9VAC25-580-10 *et seq*. By decision dated [DATE], the DEQ determined that the following UST(s) at the referenced facility were in violation of [insert sections of regulation violated per UST] and ineligible to accept delivery or deposit of a regulated substance:

[Insert identifying tank information in grid below]

DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored	DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored

On [DATE] DEQ personnel attached a delivery prohibition tag to the ineligible UST(s) in accordance with 9 VAC 25-580-370.

On [DATE], the facility submitted supporting documentation to demonstrate that the violation(s) rendering the UST(s) ineligible for delivery has/have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff does not agree that the following violation(s) has/have been resolved.

[36] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at Chapter 580.

.

[Note: include list of work to be performed.]

Please submit additional documentation demonstrating that this work has been completed to [inspector name and address].

Please contact [inspector name] at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-K Return to Compliance/Delivery Prohibition Tag Removal Letter

[Date]

[Owner Name and Address]

[Operator Name and Address]

Re: [Facility Name and ID#]
Delivery Prohibition Tag Removal

Dear [owner and operator]:

On [DATE], the Department of Environmental Quality (DEQ), acting on behalf of the State Water Control Board, held an Informal Fact Finding Proceeding in accordance with 9VAC25-580-370. The purpose of the Proceeding was to determine whether the underground storage tank(s) (USTs) at this facility were ineligible for delivery, deposit, or acceptance of a regulated substance based on violation(s) of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[37] 9VAC25-580-10 *et seq*. By decision dated [DATE], the DEQ determined that the following UST(s) at the referenced facility were in violation of [*insert* sections of regulation violated] and ineligible to accept delivery or deposit of a regulated substance:

[Insert identifying tank information in the grid below]

DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored	DP Tag #	DEQ Tank #	Tank Size (Gal)	Product Stored

On [DATE] DEQ personnel attached a delivery prohibition tag to the ineligible UST(s) in accordance with 9VAC25-580-370.

On [DATE], the facility submitted supporting documentation to demonstrate that the violation(s) rendering the UST(s) ineligible for delivery have been resolved. Based on a review of the documentation [*insert if applicable* "and subsequent site visit"] staff agrees that the violation(s), determined on [*insert* decision date] has/have been resolved.

[37] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at Chapter 580.

.

[Within 2 business days of the date of this letter, DEQ staff, in accordance with 9VAC25-580-370, will remove the delivery prohibition tag(s) from the above referenced USTs. Upon removal of the delivery prohibition tags, the USTs will be eligible for delivery, deposit or acceptance of a regulated substance.]

OR

[By this letter, you are authorized, pursuant to 9VAC25-580-370, to remove the delivery prohibition tag immediately. Upon removal of the delivery prohibition tag, the USTs are eligible for delivery, deposit, or acceptance of a regulated substance. You must return the delivery prohibition tags to DEQ at the following address: [*insert* regional office address].

Please note that it is DEQ's practice to inspect previously tagged facilities within six months to a year after the removal of the tags to insure continued compliance with the UST regulation. If DEQ discovers violations at this facility as a result of a future inspection or site visit, the USTs may again be subject to an expedited enforcement process, including the delivery prohibition process. Further, this letter has no bearing on any other enforcement actions that may be pending at this facility.

Please contact me at XXX-XXX-XXXX if you have further questions.

Sincerely,

Petroleum Programs Manager

cc: Presiding officer
OSRR Director
Inspector
OSRR Web author
E-mail list

Appendix-L Post-inspection Letter for Red-tagged Facilities

DATE

Name & Address

Re: Underground Storage Tank (UST) Compliance at xxxxxx

Facility Identification No. (FAC. ID. NO.): xxxxx

Dear Owner:

As you are aware, on (IFF proceeding date), the Department of Environmental Quality (DEQ) held an informal fact finding proceeding (IFF) that resulted in the determination that the (fill in #) USTs located at (facility name) are subject to the delivery prohibition guidelines of Regulation 9VAC25-580-370. A tag was subsequently placed on the fill ports of the USTs by DEQ staff marking them as ineligible for delivery, deposit, or acceptance of a regulated substance pending compliance with (Add brief description of violations, e.g. the registration and leak detection requirements set forth in the UST Technical Regulation (Chapter 580)).

On (inspection date), DEQ staff performed a routine compliance inspection at the facility and noted that, in addition to the items identified during the IFF, the facility had not maintained (Add brief description of violations, e.g., the cathodic protection system testing as required by Regulation 9VAC25-580-90.)

Please be aware that the (Describe new violation, e.g. cathodic protection system testing requirements found in Regulation 9VAC-25-580-90) must be met along with the items of non compliance identified in the IFF before the UST system can be brought back into active use.

If you have any questions regarding this matter, please contact me at (phone #) or via e-mail at (email address).

Sincerely,

Signature Line

Inspector name

cc: facility file

Appendix-M Return to Compliance Letter

DATE

Name
Company
Address

Re: Underground Storage Tank (UST) Facility Formal Compliance Inspection for «name»
Facility Identification No. (FAC. ID. NO.):

Dear [Name]:

[insert appropriate introductory paragraph]

Based upon a review of your submittal and our files for the site, it appears that the compliance issues noted during the UST inspection conducted on [date], related to the UST Technical Regulation (9-VAC25-580), have been addressed.

Please note that DEQ will continue to inspect this facility on a regular basis, and this letter has no bearing on any future compliance issues discovered at this facility.

If you have any questions or need additional information, please contact me at [phone number].

Sincerely,

Inspector Name
Staff Title

cc: facility compliance file