February 24, 2020

Re: Response to Comments on Proposed Rulemaking: Underground Storage Tank Regulations

INTRODUCTION

The following are Department of Energy and Environment (the Department) responses to comments on the proposed rulemaking Underground Storage Tanks Regulations, published in the December 28, 2018 issue of the DC Register (DCR). The Department opened a 30-day public comment period on December 28, 2018, and later extended the public comment period through March 5, 2019. DOEE appreciates the time and effort taken by all parties who reviewed and commented on the proposed rulemaking. These responses to comments are organized to reflect the structure of the proposed rulemaking. Longer comments are excerpted in this document and multiple comments on the same subject are combined. The full text of each comment is included in the attachments. Each comment is followed by the Department's response.

GENERAL COMMENTS

1. *The District Department of Energy and Environment (DOEE) should finalize only those sections of the proposed regulations that are necessary to implement the 2015 federal Underground Storage Tank (UST) requirements in order to obtain state program approval of the District's UST program.*

Although the Department recognizes that most of the 2015 federal UST requirements are technical requirements for active USTs, the Department's rulemaking authority is not limited to amendments required to maintain state program approval. *See* D.C. Official Code § 8-113.12. The proposed updates to Chapters 62 through 64 are necessary to bring the regulations up to date with the Department's current practice for reviewing risk-based corrective action, clarify the requirements for corrective action, and ensure adequate protection of public health and the environment during and following leaking underground storage tank (LUST) remediation. Many of the updates reflect clarifications in response to questions raised by responsible and voluntary remediating parties during the corrective action process. The Department has overseen many successful LUST remediation projects using the standards reflected in the regulations and the District of Columbia Risk-Based Corrective Action (RBCA) Technical Guidance document and does not agree with the commenter that the updates to the corrective action provisions should be removed from the proposed regulations. Comments on specific provisions of Chapters 62 through 64 are addressed below.

DOEE intends to develop new regulations for the District's Voluntary Cleanup Program, which may include incorporation of the Voluntary Remediation Program (VRAP) for LUST into the Voluntary Cleanup Program to improve consistency among and coordination of voluntary cleanups in the District. The Department has and will continue to engage stakeholders in the development of those regulations. DOEE will also engage stakeholders and provide an opportunity for public comment before making changes to the RBCA Technical Guidance

document.

2. *The proposed rules relating to release reporting continue to act as a disincentive for property sellers to allow pre-acquisition environmental due diligence, including sampling. Federal UST regulations at 40 C.F.R. §280.50(a) mandate that owners and operators of USTs report within 24 hours the discovery of releases of regulated substances from USTs. DOEE's existing UST reporting regulations are much broader than the federal UST regulations and impose release reporting obligations on "any authorized agency of a responsible party" and "any person who engages in site investigation, assessment, remediation, or geotechnical exploration."*

The release reporting requirements are established in the District's Underground Storage Tank Management Act, which provides:

> Any responsible party or any authorized agent of a responsible party; any person who tests, installs, or removes tanks; any person who engages in site investigation, assessment, remediation, or geotechnical exploration; or any public utility company or authorized agent of a public utility company who knows, or has reason to know, of a release from an underground storage tank shall notify the Mayor of the release.

D.C. Official Code § 8-113.03(a). Because the notification requirement is codified in statute, DOEE cannot restrict notification to "owners and operators" through a regulatory change. Furthermore, the broad notification requirements protect District residents by requiring prompt notification of releases that could be harmful to human health and the environment if not quickly contained and remediated.

3. *DOEE's proposed UST regulations fail to provide a mechanism for innocent property owners who did not cause releases to participate in the Voluntary Remediation Action Program or to obtain liability protections.*

   Regulations requiring developers to shoulder costs of environmental remediation of underground storage tanks, or environmental remediation of prior land owners pollution in general, is inconsistent with foundational principles of democracy. Prior land owners should be held accountable for their actions, whether it involved direct pollution or indirect pollution through abandonment of articles on land which subsequently caused damage to the land. In lieu of the proposed requirements, I would support alternative regulation requiring prior owners of land to bear the economic burden of environmental remediation of the land, even if such land has been sold to another party, and even if knowledge of the tanks and/or pollution was not disclosed at time of sale. The party responsible for damaging the land should be responsible for the cost of cleanup. Neither the government nor future land owners should be legally required to pay for it.

Like the notification requirements, the definition of "responsible party" is set forth in District's Underground Storage Tank Management Act and includes:

> The owner of real property where an underground storage tank is or was located or where contamination from an underground storage tank is discovered if the owner or operator of the tank as defined in paragraphs 3 and 4 cannot be located or is insolvent, or, if the real property owner refuses without good cause to permit the owner or operator of the tank access to the property to investigate or remediate the site.

D.C. Official Code § 8-113.01(9)(A)(v). DOEE cannot change the statutory definition through regulation. DOEE seeks to hold owners and operators of USTs or other parties who contributed to a release accountable for remediation whenever possible. When no other solvent responsible party can be located, however, District law holds the current property owner responsible. This is necessary to ensure there is a mechanism to protect the public and the District's natural resources from harm from abandoned tanks.

4. *We were told two years ago that DOEE was working on Stage II decommissioning and it seems like these regulations would be the time to do that. States all around have eliminated Stage II with no problems at all. The truth is Stage II hurts air quality as ORVR is more efficient without being paired with Stage II. EPA studies with dynamic testing of vehicles with up to 100,000 miles on the odometer attests to this fact.*

   There is no trade off from eliminating Stage II. Air quality benefits and station owners benefit from not maintaining expensive equipment. As the primary stake holder representing dealers, I think it is important to meet and have a discussion on the proposed UST regulations before implementation. I would also like to discuss adding a regulation for decommissioning of Stage II.

The proposed amendments are updates to the Underground Storage Tank Regulations in 20 DCMR Chapters 55-67 and 70. The requirement for Stage II Vapor Recovery is part of the District's Air Quality regulations in 20 DCMR Chapter 7. DOEE is reviewing Stage II decommissioning and, if it determines Stage II decommissioning is appropriate for the District, would propose separate amendments to the Air Quality regulations for Stage II decommissioning.

5. *The December 28, 2018 published regulations regarding UST is a tremendous rewrite that warrants a stakeholder meeting before the closing of public comments. Your publication makes it very hard to compare current regulations, federal requirements, and the DC proposed changes.*

   In surrounding states specifically in DE, VA, and MD several meetings have taken place to discuss and better understand the complex changes being made by the regulating agency.

   The cost vs. benefit of your proposals should be fully vetted - we need a better understanding as to your rationale before official comments close.

DC has very few service stations remaining. There is very little room for error should your regulations result in closures rather than upgrades.

In response to the comment, DOEE provided a redline version of the proposed regulations showing changes from the previous regulations, held a conference call with stakeholders on February 26, 2019, and extended the comment period twice as published in the DC Register on January 18, 2019 and February 22, 2019.

SECTION AND PARAGRAPH	COMMENT
1. *5500.3*	*The District building and fire code do not apply to Federal Buildings. Owners or operators of USTs on federal facilities shall comply with the requirements of this Subtitle, except the required notice to the District of Columbia Fire Chief shall be given instead to the Fire Chief or an official designated by the federal facility. The language in section 5500.3 should remain unchanged.* *Section 5500.3 should leave the exclusion:* *5500.3 Owners or operators of USTs on Federal facilities shall comply with the requirements of this Subtitle, except the required notice to the District of Columbia Fire Chief shall be given instead to the Fire Chief or an official designated by the federal facility.*

The UST regulations have always applied to USTs on federal facilities in the District. The only change is requiring notice to the District of Columbia Fire Chief as is required for other USTs. The District of Columbia Department of Fire and Emergency Medical Services needs to be aware of spill or release incidents even if they occur on federal property to ensure they can adequately protect the safety of District residents.

2. *5601.7*	*Throughout its proposed rules, DOEE incorporates online forms. This is problematic given the agency's poor record of keeping those forms up to date. By way of example, 5601.7 would prohibit a party from depositing a regulated substance into an UST without confirming that the facility is not on a list of facilities prohibited by DOEE from receiving regulated substances. The delivery prohibition list is posted on DOEE's website at https://doee.dc.gov/publication/delivery-prohibition-guidance-usts. As of February 7, 2019, however, the list was last updated on April 12, 2018 and contained numerous facilities which owed DOEE as little as $130. The*

facilities on the list include federal military complexes, foreign embassies, hotels, and residential apartment buildings. If a facility should not receive regulated substances, the easiest way DOEE could alert fuel deliver services would be to remove the facility's registration from the premises. To require delivery companies to refuse to deliver fuel to facilities listed on an online form that DOEE cannot be bothered to update more than once a year will inevitably lead to a situation where the law is rightfully ignored or a facility that was late delivering a $130 payment to DOEE will be unable to secure fuel for months. As many of these facilities presumably use fuel to operate backup generators, the unworkable online prohibition list proposed by DOEE could lead to significant disruptions to federal military facilities, embassies, hotels, and apartment buildings. This proposed regulation is a perfect example that DOEE's appetite for promulgating new and complex regulations far exceeds its ability to perform the work necessary to make those regulations workable.

The UST regulations since August 2009 required that a person verify that a facility is not on the delivery prohibition list before depositing a regulated substance into the UST. Prior to the proposed rulemaking, 20 DCMR § 5601.12 stated:

> 5601.12 No person shall deposit a regulated substance into an UST, without first confirming that the facility is a currently registered facility, and that the facility has not been found to be in violation of these regulations by:
>
> (a) Ensuring that a current certificate of registration is present at the facility; and
>
> (b) Ensuring that the facility is not on the list of facilities at which delivery of a regulated substance has been prohibited by the Director.

The only change in the proposed regulations is the addition of a reference to where the delivery prohibition list may be found on DOEE's website. DOEE has updated the list and will update it more frequently in the future. A person may also contact the UST Branch to confirm the current registration status of a facility.

3. ***5602.4*** *Section 5602.4 would require the owner or operator of a UST facility to maintain records for the life of the UST system. Given that the definition of "UST system" at 7099.1 includes all components of a system, this regulation would effectively require facilities to indefinitely maintain records associated with USTs or other equipment that has long since been replaced as long as a UST system remains at the facility. This recordkeeping requirement is excessive and goes far beyond the requirements in the comparable federal regulations at 40 C.F.R. § 280.45.*

40 C.F.R. § 280.45 pertains only to release detection recordkeeping. Section 5602 of the District's UST regulations is analogous to 40 C.F.R. § 280.34, which addresses recordkeeping more broadly.

Section 5602.4 requires retention only of the records listed in 5602.3(a), (c), and (f) for ten years or the operating life of the system, whichever is longer. This includes documentation of the operation of corrosion protection equipment (§ 5901.2), documentation of UST system repairs (§ 5902), and documentation of UST system compatibility (§ 5903). Maintaining these records for the life of the UST system is essential to allow owners, operators, and regulators to determine whether the UST system has been properly used and maintained to avoid releases.

Section 5602.7 requires retention of records listed in § 5602.3 for the lifetime of the UST only if no other time is specified. Other retention periods are specified in the regulations for the records listed in § 5602.3(b), documentation of the impressed cathodic protection system inspections (*see* § 5901.6); § 5602.3(d), documentation of compliance with release detection requirements (*see* § 6001); § 5602.3(e), result of closure assessment (*see* § 6101); § 5602.3(g), documentation of operator training (*see* § 6503); and § 5602.3(h), documentation of walkthrough inspections (*see* § 5904).

Records required to be kept for the lifetime of the UST include the records listed in § 5602.3(i), documentation of compliance for spill and overfill prevention equipment and for containment sumps used for interstitial monitoring of piping (§§ 5900.12 through 5900.15), and § 5602.3(j), a corrosion expert's analysis of corrosion potential if corrosion protection is not used (§ 5701.1(d)). Federal regulations require owners and operators to maintain documentation showing that spill prevention equipment and containment sumps are double walled and periodically monitored unless the equipment and sumps are tightness tested every three years. 40 C.F.R. § 280.35(c)(2). Federal regulations also require owners and operators to maintain a corrosion expert's analysis for the life of the tank if no corrosion protection is used. 40 C.F.R. § 280.20(a)(4)(ii).

4. ***5602.5*** *Section 5602.5 would require that records associated with an UST facility be kept at the facility or "another location in the District." This goes beyond the federal requirements at 40 C.F.R. § 280.34(c), which provides that records can be kept "at a readily available alternative site and be provided for inspection... upon request." Given the ubiquity of computer networks and cloud storage, there is no justification for requiring UST records to be physically located in the District.*

DOEE is requiring that records be maintained at the facility or elsewhere in the District to avoid DOEE staff having to expend taxpayer funds to travel outside of the District to review records. Records storage methods, such as cloud storage, that allow DOEE inspectors to access the records from within the District are acceptable. DOEE is including language in the final rulemaking to clarify this intent.

5. 5605.2 *Our members understand the need to meet federal requirements under 40 CFR Part 281 to maintain state program approval.*

In the same way we do not understand the fee increases on UST registration and permits. District of Columbia has the highest fees now. Our dealers pay a yearly fee for each UST they own. This yearly fee should be eliminated, not increased, and become a one-time registration fee.

The fee increase is necessary to allow DOEE to continue to provide UST registration and inspection services at a level sufficient to maintain state program approval. DOEE has always charged an annual fee that is higher than other states, consistent with the higher cost of living in the District. Unlike many other states' UST programs, DOEE does not receive gas tax revenues and does not maintain a cleanup fund. Registration fees help cover the costs of inspector salaries, supplies, equipment, and emergency response.

6. 5605.3(d) *Section 5603(d) of the proposed rule imposes significant fees upon [Voluntary Remediation Action Program] VRAP participants that are volunteering to cleanup historic contamination. Specifically, DOEE seeks to require volunteers to pay $5,000 upon acceptance into the VRAP program, and $500 per year thereafter upon the anniversary date of the conditional authorization letter. Prior to this proposal and for the life of the VRAP, participants were not subject to any fees for participation in the program. DOEE did not provide any justification for this significant change to the VRAP program, nor did DOEE seek feedback from the regulated community regarding the impact that these fees would have upon their participation in the program. The proposed fees are a deterrent for developers that voluntarily remediate a site that was contaminated by a previous user, thus providing a benefit to public health and the environment. Participation in the VRAP incentivizes developers to purchase contaminated sites that require expensive cleanups and exposes them to risk, rather than choosing "greenfields" with less risk and cleanup costs. Therefore, DOEE should reconsider imposing these fees and work with the regulated community to develop a less drastic fee proposal that does not deter participation.*

DOEE is imposing the fee to cover the costs of the considerable staff time devoted to reviewing VRAP applications, corrective action plans, and closure requests and overseeing VRAP cleanups. DOEE understands and appreciates that VRAP participants are voluntarily remediating contamination left by previous users. However, VRAP also provides significant benefits to participants, allowing them to develop valuable property in the District and provide assurances to lenders, buyers, and future tenants that the health and environmental risks associated with past contamination have been removed or mitigated. Participants in the Voluntary Cleanup Program administered by DOEE's Land Remediation Branch pay a fee of $10,000 to participate in a similar program. DOEE does not believe a fee of $5,000 is excessive considering the overall cost of developments that participate in the program.

DOEE is also implementing the annual fee to provide an incentive for more timely completion of VRAP cleanups. VRAP cleanups are sometimes delayed for months or years after DOEE approval of the VRAP application. Long delays may hamper DOEEs ability to require corrective action by a responsible party if the VRAP participant ultimately withdraws or fails to complete the cleanup. The modest fee of $500 per year will provide an incentive for voluntary parties to work quickly towards a no further action letter or case closure.

7. ***5605.3(d)*** *DOEE proposes an annual fee of $500 for the applicant to continue in the VRAP program, a fee that would be charged upon the anniversary date of the Conditional Authorization Letter. What is not clear is when the annual fee would end. Upon issuance of the No Further Action letter? As DOEE knows, many sites require long-term monitoring and maintenance, and these long-term monitoring and maintenance obligations are beginning to be reflected in an Environmental Covenant. The Environmental Covenant is typically executed after issuance of the No Further Action letter. So when is the applicant no longer "in" the program? Participants need to know with certainty how long they will be required to pay these fees. We submit that, if these fees are approved, the annual fee should terminate upon of the No Further Action Letter. Otherwise, the prospect that this fee may linger indefinitely would diminish any future interest in participating in the VRAP program because developers require certainty as to the costs associated with their development projects.*

DOEE intends the annual fee to end when an NFA or case closure is issued. DOEE is adding clarifying language to § 5605.3(d).

8. ***5605.3(d)*** *As currently written, the proposed rule does not clearly state whether existing VRAP participants would be exempted from these new proposed fees. We submit that existing participants in the VRAP program should be exempt from these fees because they did not factor these kinds of costs into their project budgets and financial underwriting, and should not have to bear the cost of these unexpected fees. In fact, many existing participants would not have entered the VRAP had these additional costs (and other requirements) been in place. The final rule should clarify that these fees, if adopted will apply to future participants only.*

The initial fee and annual fee will not apply to VRAP participants whose applications were approved prior to the effective date of the regulations, unless the VRAP application is withdrawn or approval is revoked in accordance with § 6212.9 and the applicant later reapplies. DOEE is adding clarifying language to § 5605.3(d).

9. ***5702*** *In Section 5702 the District has proposed changing the definition of Hazardous Substance, by adding fuel oils to the definition. On the federal level the EPA excluded oils and petroleum to prevent form unduly affecting commerce as limits on Transporting a hazardous substance on roads especially within the District. DOEE should ensure that this would not make it more difficult to transport fuel oil by changing this definition.*

It is also worth noting that it seems that changing the definition in this manner is both arbitrary and capricious. The District should treat the storage of petroleum oils above 1,100 gallons the same. The release of diesel fuel, vs fuel oil or kerosene hold identical potential to cause environmental harm if released. It would seem the District would be on stronger ground to either wholly exclude petroleum oil as is in the Federal definition, or leave all petroleum oils as a regulated substance as it is currently defined.

CERCLA 42 CFR 101(14) The term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [33 U.S.C. 1321(b)(2)(A)], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [33 U.S.C. 1317(a)], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [15 U.S.C. 2606]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

DOEE has not added fuel oil to the definition of hazardous substance. Section 5702 of the proposed regulation contains performance standards for new hazardous substances UST systems. Hazardous substance is defined in § 7099.1 as "a hazardous substance as defined in § 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC § 9601(14) (but not including any substance regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act of 1976, 42 USC §§ 6901 *et seq.*)."

10. ***6001.7*** *Section 6001.7 of the proposed regulations requires an owner or operator who uses groundwater or vapor monitoring for release detection to have site assessment reports signed by a professional engineer or professional geologist. The District does not register geologists. The proposed regulations should be updated to confirm that the District will recognize licensed professionals from other jurisdictions.*

The language of § 6001.7 is from 40 C.F.R. § 280.45(a) and allows site assessment reports to be signed by a professional engineer, professional geologist, "*or equivalent licensed professional with experience in environmental engineering, hydrogeology, or other relevant technical discipline acceptable to the Department*" (emphasis added). Nothing in § 6001.7 requires that the licensed professional preparing a site assessment report for groundwater or vapor monitoring for release detection be licensed by the District. Note that DOEE does require District-licensed professionals for other requirements of the UST regulations, such as tank removal variances in § 6101.7(b).

11. ***6101.13 and 6101.14*** *As proposed, Section 6101.13 and 6101.14 would allow excavated soils to be returned to the excavation or used elsewhere on a property if they do not exceed Tier 0 screening levels. Since Tier 0 is the most strict cleanup standard, DOEE's rules imply that soil which does not meet lesser Tier 1 or Tier 2 standards should not be returned to the excavation site but must be transported to an appropriate disposal facility offsite. For some contaminants, notably total petroleum hydrocarbons gasoline range organics ("TPH/GRO"), the Tier 0 standard is actually less stringent than the Tier 1 standard. The proposed rules could therefore lead to an enigmatic scenario whereby excavated soil meets Tier 0 standards, and therefore could be used as backfill, but simultaneously exceeds Tier 1 standards, and therefore should not be used as backfill. We encourage DOEE to engage in outreach with local environmental consultants who are familiar with the intricacies of the tiered cleanup standards before finalizing these recently proposed changes.*

Contractors and consultants often request guidance from the UST Branch on soil sampling and disposal. Amendments to §§ 6101.13 and 6101.14 were intended to provide clarification and remove the ambiguity of the previous regulation, which required removal, treatment, and proper disposal of "grossly contaminated soils." Section 6101.13 uses the Tier 0 screening levels to be consistent with the levels used for LUST case opening decisions and the standard for reuse on site during corrective action pursuant to § 6207.5, which has not changed from the previous regulation. DOEE is adding language to clarify that the Tier 1 standard for TPH-GRO should be used for site with current or future residential use.

12. ***6101.13(d)*** *Newly proposed Section 6101.13(d) would prohibit soil excavated during corrective action from being placed on another property unless approved by DOEE. DOEE should amend this proposed regulation to clarify that this prohibition would not apply to excavated soil that is uncontaminated.*

Because of the risk of cross contamination from reuse of soil from a LUST site on another property, DOEE is requiring specific approval of such use in § 6101.13(d). If a responsible party or VRAP participant intends to reuse soil off-site, plans for soil screening and reuse can be included as part of the Corrective Action Plan.

13. ***6101.15*** *Proposed revisions to § 6101.15 require the collection of confirmatory soil and groundwater samples upon the discovery of a release during tank closure activities. If those samples indicate that contamination remains above Tier 1 screening levels, additional soil removal is required. Given the turn-around time for laboratories to process soil and groundwater samples, situation could arise where days or weeks pass between the time the UST and adjacent contaminated soil are removed and the time that sampling results reveal the presence of additional contamination. While parties conducting tank removals usually preferred to keep excavation pits open until they confirm that no further excavations are necessary, there could be situations – such as during a heavy rain event – in which keeping excavation pits open for prolonged periods of time would present a risk of exacerbating contamination. Therefore, we recommend that Section 6101.15 be revised to clarify that a party can backfill an UST exaction pit immediately after the removal of the UST. This would not remove the obligation of that party to re-excavate the backfill and remove remaining contamination revealed by the results of the sampling analysis.*

The amendments to § 6101.15 simplify the language of the previous regulation without significantly changing the procedures involved. DOEE does not interpret this section as requiring a person to keep the tank excavation open while waiting for sampling results. A party conducting tank removal may backfill the excavation with soil that does not exceed Tier 0 standards, provided the person understands that removal of the backfill and further excavation may be required in accordance with § 6101.15(d).

14. ***6103.2 and 6103.3*** *Sections 6103.2 and 6103.3 of the proposed regulations require, collectively, a responsible party to keep all records demonstrating compliance with the tank closure requirements for ten (10) years after permanent closure or change in use and then subsequently deliver them to the department. DOEE did not provide a justification for these new, and extremely burdensome requirements. In addition, DOEE should confirm if these record requirements apply retroactively to current and past responsible parties, which they should not, and explain what the Department intends to do with these records.*

Section 6103.2 requires the responsible party to keep closure assessment records for ten years "*or* deliver the records to the Department in accordance with the provisions of § 5602.6" (emphasis added). Section 5602.6 provides "if an UST is permanently closed and the records cannot be kept at the facility where the UST was located or at an alternative location under §§ 5602.4 and 5602.5, the owner or operator shall deliver the permanent closure records required under § 6101 to the Department." Therefore, a responsible party who cannot maintain the records may deliver them to the Department before the end of the ten year retention period. DOEE does not intend for this requirement to apply retroactively to past closures.

DOEE permanently retains these records so that future owners of the site, adjacent property owners, and other stakeholders can verify proper closure of historic UST systems.

15. ***6200.5*** *Section 6200.5 of the proposed regulations state that a voice mail message is not considered telephone notification of a spill or overfill. DOEE did not provide justification for this regulation. A voice mail message should be considered adequate proof of a good faith effort made to notify DOEE officials. Otherwise, the District should be prepared to establish and staff a 24-hour call-in line like other jurisdictions that require spill and overfill notifications.*

In order to ensure prompt response to spill and overfill incidents, DOEE prefers to have callers speak to a staff member rather than leave a voicemail. Reporting of spills and overfills can also be done by e-mail outside regular business hours in accordance with § 6201.2.

16. ***6201.2 and 6201.5*** *For notification of spills/releases or materials that may pose a life safety risk to the public, suggest listing The District of Columbia Fire and Emergency Medical Services (FEMS) as a more accurate contact.*

Subsections 6201.2 and 6201.5 require that certain spills and releases be reported to the District Fire Chief. The Fire Chief directs FEMS. The amendments provide more specificity by including the phone number for the Office of the Fire Marshall within FEMS, which handles spill response.

17. ***6206, 6209***

Sections 6206 and 6209 of the proposed regulations mandate the use of DOEE's risk-based corrective action ("RBCA") technical guidance documents to determine Tier 1 and Tier 2 cleanup standards for water, soil, soil vapor, and indoor air. These proposed cleanup standards are far more expansive than existing standards.

The proposed regulations do not cite specific RBCA documents that must be used in particular situations, but rather direct users to an internet webpage maintained by DOEE that contains links to dozens of different guidance documents and additional webpages that in turn contain additional links to dozens of guidance documents. DOEE's attempt to incorporate into the DC Register a fluid webpage on which DOEE can add, remove, or amend documents in an instant with no public notice of oversight violates all norms of the District of Columbia Administrative Procedures Act. The majority of DOEE's RBCA documents have never been published in the DC Register for public comment, in strict violation of 2-558 ("Except in the case of emergency rules or acts, no rule or document of general applicability and legal effect adopted or enacted on or after March 6, 1989, shall become effective until after its publication in the District of Columbia Register....")

One of the few RBCA documents that has been subject to public notice, DOEE's Interim Technical Guidance Document, was explained to the public as an interim guidance document that was a work in progress, received only five public comments, and continued to be updated for nearly a year after the conclusion of the meager public notice campaign. DOEE never explained that any of these guidance documents would be used as strict cleanup standards in the District.

If DOEE intends for these guidance documents to set strict cleanup standards for the District, then these documents must all be published in the DC Register pursuant to D.C. Code § 2-553(b)(1) and the District of Columbia Municipal Regulations in compliance with D.C. Code § 2-552(b)(1). While there are exceptions to these publication requirements, DOEE did not invoke any such exemptions in the proposed rulemaking.

The expansive changes that the wholesale adoption of these RBCA documents will produce warrants their individual publication in the DC Register as part of a public comment period dedicated only to those changes rather than combined with the plethora of other changes DOEE is proposing to the UST regulations.

The comment misconstrues the proposed regulation as incorporating all documents on a website, when in fact it incorporates a specific document, the RBCA Technical Guidance. In the amendments, DOEE added a link to a website where the guidance can be found, in an effort to be helpful to the regulated community.

The incorporation of this guidance is not a change to the regulations. The previous regulations, at § 6206.1 provided "Risk-based decision-making (RBDM) and development of a risk-based corrective action (RBCA) plan shall be conducted subject to the terms and conditions set forth in this section and/or as further explained in applicable UST Division protocols and the Risk-Based Decision making Technical Guidance Document." The RBCA Technical Guidance Document has been in use in the District since 2002 and was last updated in June 2011 with input from the consulting community. The Tier 1 standards in § 6209 of the previous regulation authorized the Director to adopt standards for soil and MTBE and naphthalene in groundwater through the RBCA Technical Guidance Document. The previous regulation did not define Tier 2 standards, but authorized a responsible party to "perform Tier 2 site-specific evaluation as described in the Risk-Based Decision making Technical Guidance Document." DOEE is not proposing any changes to the June 2011 Guidance Document as part of this rulemaking.

Furthermore, the key requirements for risk-based corrective action are included in the regulations. As in the previous regulations, the current regulations identify chemicals of concern and tolerable risk levels for risk-based corrective action. Including in the regulations lengthy tables of toxicity values for hundreds of chemicals, screening levels for multiple environmental media and receptors, and calculations used to calculate site-specific risks would be impractical.

Finally, by issuing the RBCA Technical Guidance Document, DOEE provided more flexibility to responsible and other remediating parties. The previous regulations at 6209.2 provided that the stringent Tier 0 standards for soil were the interim standards until the Director adopted Tier 1 standards or outlined them in the RBCA Technical Guidance Document. The RBCA Technical Guidance Document establishes Tier 1 risk-based screening levels and provides guidance on how to select remediation targets from the Tier 1 levels or develop site-specific Tier 2 target levels. If the commenter is correct that the guidance is unlawful, DOEE should be requiring all parties to comply with Tier 0 standards. DOEE does not understand that to be the commenter's intent.

If DOEE amends the RBCA Technical Guidance Document, an opportunity for public comment will be provided prior to finalizing the amendments.

18. ***6206.2(d)*** *Section 6206.2(d) of the proposed regulations requires responsible parties to select a qualified risk assessor prior to developing a RBCA plan. The Department should maintain a list of qualified risk assessors or allow responsible parties to evaluate the credentials of the risk assessors they use. The proposed regulations should be updated to clarify this issue.*

DOEE does not plan to certify or maintain a list of qualified risk assessors. Risk assessors who have completed risk-based corrective action training provided by one of the entities listed in § 6206.2(d) are considered qualified by DOEE. In addition, a responsible party seeking to use a

risk assessor with training from another entity may request DOEE approval of that third party training.

19. ***6206.4(c)*** *Proposed Section 6206.4(c) seeks to impose a one in one million ($1x10^{-6}$) excess cancer risk for carcinogens. DOEE's proposed rule does not explain whether this excess cancer risk is the total excess cancer risk at a cleanup site or the excess cancer risk for each contaminant present at the site. Using a $1x10^{-6}$ excess cancer risk for each contaminant would generally be in alignment with EPA's RBCA policies. To use a total excess cancer risk of $1x10^{-6}$ would be unnecessarily conservative and significantly increase the costs of bringing certain sites back into productive use. EPA and other state programs typically require total cancer risk not to exceed $1x\ 10^{-4}$.*

For residential development, the previous regulation established the maximum tolerable health risk for carcinogens of a one in one million excess cancer risk. The DC RBCA Technical Guidance makes clear that this is an individual risk for each contaminant:

> The estimation of cumulative risk or the hazard index (HI, sum of [hazard quotients] HQs) is not required for the following reasons:
>
> - There are a limited number of [contaminants of concern] COCs at most regulated UST release sites and the COC's affect different organs;
> - The DCRBCA process uses conservative exposure factors and target risk levels; and
> - The models used to estimate the RBSLs and SSTLs include numerous conservative assumptions.
>
> Thus, the risk and HQ from multiple COCs and multiple routes of exposure will not be added except for the routes of exposure associated with the surficial soil. The surficial soil [risk-based screening levels] RBSLs and [site-specific target levels] SSTLs assume the cumulative effect of ingestion, inhalation, and dermal contact with a chemical.

See District of Columbia Risk-Based Corrective Action Technical Guidance at 5-6 (June 2011).

20. ***6206.4(c), 6207.4(c)*** *DOEE's proposed regulations falsely equate property zoning with reasonably anticipated future use for purposes of risk-based cleanups. Proposed regulations at 6206.4(c) and 6207.4(c) would respectively mandate a particular cleanup standard "for any property where zoning allows for residential or mixed use" and require long-term monitoring to ensure contamination does not present adverse impacts under "reasonably foreseeable future uses of the site based on District zoning."*

DOEE's attempt to inextricably link the reasonably foreseeable future use of a particular site to the zoning of the neighborhood in which the site is located is both counterproductive and represents an explicit deviation from the very RBCA Guidance documents that DOEE is attempting to incorporate by reference into the UST regulations.

The Department believes that in the absence of enforceable activity and use limitations, zoning is an important indicator of foreseeable future use. However, the Department recognizes that the RBCA Technical Guidance includes other indicators of future land use. The Department is therefore removing the reference to zoning in § 6206.4(c) and clarifying in § 6207.4(c) that reasonably foreseeable future use may be based on zoning or other factors described in the RBCA Technical Guidance. In accordance with the RBCA Technical Guidance, DOEE will generally require institutional controls before closing a case using a risk assessment based on commercial use. See District of Columbia Risk-Based Corrective Action Technical Guidance at 4-6 (June 2011). In such cases, the developer can use an environmental covenant prepared in accordance with D.C. Code § 8-671.01 *et seq.* to establish enforceable activity and use limitations. DOEE has developed a template environmental covenant for this purpose.

21. ***6206.4(e)*** *The proposed regulations illogically seek to require groundwater to be evaluated as an exposure route for risk-based cleanups. For proposed rule 6206.4(e), DOEE seeks to add "ground water protection" as an exposure route that must be included and protected. This is a significant and unnecessary change, as no one is drinking groundwater in the District of Columbia. The groundwater exposure pathway (e.g., vapor intrusion, discharges to surface water) is otherwise being evaluated as part of the RBCA process.*

This amendment was made to clarify in the UST regulations what has always been required in the District's groundwater quality regulations, that is, protection of groundwater for future use. 21 DCMR § 1150.2 provides:

> Ground water in the District is not currently being used as a potable water source; however, where attainable, it shall be protected for beneficial uses, including

> surface water recharge, drinking water in other jurisdictions, and potential future use as a raw drinking water source in the District. Ground waters shall be protected from pollution because the lack of this protection might result in the following:
>
> (a) Large future cleanup costs of contaminated ground water;
>
> (b) Contaminated ground water becoming a potential health hazard to the public;
>
> (c) Contaminated ground water mixing with and contaminating adjacent surface waters;
>
> (d) Contaminated ground water mixing with and contaminating the ground waters of adjacent jurisdictions; or
>
> (e) Harm to or loss of sensitive flora or fauna.

This requirement is reflected in the DCRBCA Technical Guidance, which requires evaluation of a hypothetical point of exposure (POE) for groundwater:

> The groundwater ingestion POE will be established at the nearest point where a water use well currently exists, or is most likely to exist in the foreseeable future. If no such well exists or is unlikely to be installed, then the POE, for Tier 1 evaluation, will be located at the closest downgradient private property boundary.
>
> For Tier 2A and Tier 2B evaluations, the POE may be located at a distance lesser of (i) the nearest downgradient location of a drinking water well, (ii) 500 feet from the property boundary, or (iii) 1,000 feet from the contamination source.
>
> The above guidance for the location of the POEs has been developed based on the very low likelihood of the current and potential future shallow groundwater use in the DC area. The RP should be able to demonstrate that (i) groundwater between the source and the POE is not likely to be used in the foreseeable future, and (ii) the plume is stable prior to receiving a NFA determination.

See District of Columbia Risk-Based Corrective Action Technical Guidance at 5-10 (June 2011). This site-specific, risk-based approach to groundwater protection is attainable and has been met at a number of LUST sites. Furthermore, DOEE believes it is appropriate to apply the same standard to on-site groundwater remediation because 1) DOEE should not issue a no further action or case closure letter based on a less protective standard, and 2) once development is completed, there is generally a building occupying the site and impeding further on-site groundwater remediation. DOEE will continue to require protection of groundwater in risk-based cleanups.

22. ***6207.11*** *Proposed rule 6207.11 also shortens the time in which a responsible party must begin its remediation work from 60 days to 30 days. At the same time that DOEE's proposed rules attempt to force VRPs and responsible parties into unworkable remediation timelines, the agency seeks to eliminate the few timelines that govern the agency's actions. Proposed rule 6207.7 would eliminate the mandate that DOEE either approve or disapprove of a proposed corrective action plan within 60 days of submission. The new language would give DOEE an unlimited amount of time to make this decision. The District's voluntary cleanup program ("VCP"), which addresses the cleanup of sites contaminated by hazardous substances rather than petroleum releases, provides DOEE generous amounts of time (i.e., 90 business days) to approve or deny a VCP application. In our experience, DOEE takes the full 90 business days for even relatively simple applications. The long review times are a key reason why the District's VCP program is notoriously less effective than the VRAP. The prospect of DOEE having an unlimited time to review draft cleanup action plans would significantly slow down VRAP cleanups. All deadlines in the existing UST regulations that mandate DOEE review within a definitive timeframe should be retained.*

The comment misconstrues the proposed regulation, which increased the time to begin implementation of a corrective action plan from 30 to 60 days. In addition, the regulation retains the option to negotiate a different schedule with DOEE. DOEE does not intend to change its internal review processes, but believes that those processes are more appropriately set forth in agency operating procedures rather than regulations.

23. ***6209.1*** *DOEE 's Proposed Cleanup Standards for Indoor Air are Unworkable and Ill-Advised*

DOEE's proposed revisions to 6209.1 appear to create explicit cleanup standards for indoor air. DOEE neither explains the source of its statutory authority to regulate indoor air nor why such standards are necessary. While the effects of subsurface soil or groundwater contamination on indoor air should be considered when determining the appropriate remediation standard for contaminated soil or groundwater, the direct regulation of indoor air is quite different and a drastic change in regulation. DOEE's strict application of indoor air cleanup standards will inevitably lead to situations where a party effectively remediates subsurface soil and groundwater contamination but is denied regulatory closure by DOEE because indoor air samples remain higher than the agency's cleanup standards for reasons such as emissions from nearby sources or the lawful use of consumer products or household chemicals.

The EPA Office of Solid Waste and Emergency Response ("OSWER") foresaw such scenarios in its Technical Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air. EPA cautioned that it is neither legally nor scientifically advisable to use indoor air sampling as a stand-alone regulatory standard.

> *Before performing any comparison of existing [indoor air] sampling data to recommended generic vapor intrusion screening levels (VISLs) (see Section 6.5),it is important to verify that site-specific conditions reflect the conditions and assumptions of the generic model underlying the VISLs, which are summarized in Section 6.5.2. To verify that the generic vapor intrusion model applies, there is a need for basic knowledge of the subsurface source of vapors (e.g., location, form, and extent of site-specific vapor-forming chemicals) and subsurface conditions (e.g., soil type in the vadose zone, depth to groundwater for groundwater sources), which are important elements of the [conceptual site model] (see Section 5.4). When these subsurface data are not available. EPA recommends they be collected (i.e., initiate a vapor intrusion investigation: see Section 6.3.2. for example) before relying upon risk-based screening using pre-existing sampling data.*

EPA further cautions that when indoor air contamination is caused by both vapor intrusion and indoor air contamination from background sources such as building activities, the two sources must be distinguished because EPA has no statutory authority to regulate indoor air contamination from background sources.

> *"In cases where 'background' contamination (e.g., due to indoor use of a consumer product or household chemical in a residence) may pose a human health risk, but its remediation is beyond the authority of the applicable statute, risk communication to the public may be most effective when coordinated with public health agencies."*

Accordingly, DOEE's proposed regulations should remove "indoor air" from 6209.1 to avoid any confusion that it is trying to enforce indoor air standards. If DOEE is trying to implement indoor air standards, then it owes the public and regulated community an in-depth explanation of its legal authority to do so and must engage in a meaningful dialogue about its plans to begin regulating a completely new environmental media.

This amendment brings the regulation up to date with current DOEE and federal guidance on vapor intrusion. The RBCA Technical Guidance has always included indoor air risk-based screening levels. DOEE does not use these levels as a stand-alone regulatory standard. DOEE has adopted EPA's June 2015 Technical Guide for Addressing Petroleum Vapor Intrusion At Leaking Underground Storage Tank Sites, which includes indoor air sampling paired with sub-slab soil gas sampling in the petroleum vapor intrusion evaluation process and a multiple lines of evidence approach. DOEE is adding language to the regulation to clarify this intent. In addition, various forensic analyses can be done to distinguish between contamination from vapor intrusion and contamination from background sources.

24. ***6210.5*** *Section 6210.5 should be revised to eliminate the phrase "less than a complete cleanup under Tier 0 or Tier 1 standards or only achieved Tier 2 site-specific target levels." This implies that additional future cleanup could be required and diminishes the weight of the No Further Action letter that can be issued once those cleanup standards are achieved. Cleanups to these standards are considered "complete." For example, Section 6.10.3 of ASTM E 2081, Standard Guide for Risk-Based Corrective Action, makes clear that "[i]f site conditions meet [tiered] corrective action goals and the user is confident that data support the conclusion that site conditions will meet corrective action goals in the future, then no additional corrective action activities are necessary, and the user has completed the RBCA process."*

Sections 6210.4 and 6210.5 were intended to create a clear distinction between when DOEE will issue a no further action letter or a case closure. DOEE will issue a no further action letter when responsible or other remediating party has completed all required corrective actions and DOEE determines that the site does not pose a threat to human health or the environment, but the cleanup did not achieve an intended Tier 0 or Tier 1 standard or is based on a Tier 2 risk analysis. DOEE does not anticipate requiring further action in these cases unless site conditions change such that the cleanup standards achieved are no longer protective of human health and the environment. DOEE's no further action letters generally contain the following statement: "In the event that additional work is performed at the Site that results in additional removal, disturbance, exacerbation, or excavation of residual UST-related contamination constituting a release, the person performing the work must report that release to this office, as required by 20 DCMR § 6202."

25. ***6212.1 and 6212.2*** *VRAP Applicants Want to Redevelop Property - Not Remediate LUST Sites*

DOEE's proposed rules at 6212.1 and 6212.2 introduce the concept that VRAP applicants want to voluntarily remediate LUST sites. That was never the purpose or intent of the VRAP program. Rather, the VRAP program provided a mechanism by which a prospective purchaser of a petroleum-contaminated site could obtain assurances that it could

> *remediate any contamination that it discovered during due diligence to risk-based corrective action ("RBCA") levels consistent with the intended future use of the property and then obtain a No Further Action letter. This program was never intended to be a substitution for a complete LUST cleanup, which remained the obligation of the responsible party; rather, its purpose was to be a mechanism by which a voluntary remediating party could remove enough contamination at a site to allow it to be redeveloped for a safe and productive use consistent with the site's reasonably anticipated future use. It is important for DOEE's regulations to clearly distinguish between a VRAP cleanup and a LUST cleanup. They were never intended to be the same. To make a VRAP cleanup synonymous with a LUST remediation would discourage most voluntary cleanups in the District.*
>
> *To this end, DOEE should use this rulemaking as an opportunity to clarify the existing regulations to distinguish the cleanup plans used as part of the VRAP, which DOEE and the regulated community have traditionally referred to as "voluntary remediation action plans" or "VPlans" or "VRAP Plans," from the more extensive "corrective action plans" that are prepared by responsible parties under the District's LUST program. This change would help both the regulated community and DOEE staff more easily understand the fundamental differences between voluntary cleanups conducted through the VRAP and legally mandated cleanups required for responsible parties under the LUST program.*

The proposed regulations do not introduce the concept that VRAP applicants want to remediate LUST sites – that concept has been part of the program all along. Indeed, this concept is incorporated in the name of the program, the Voluntary *Remediation* Action Program. The previous regulation at § 6213.2 provided that "persons who *wish to voluntarily remediate* LUST facilities or sites" shall submit an application to DOEE (emphasis added). Section 6213.3 gave DOEE discretion to approve or deny a VRAP application, and DOEE could deny an application if the proposed remediation was not adequately protective of human health and the environment. In order to receive a no further action or case closure letter, VRAP cleanups must meet the requirements of Chapter 62 like any other LUST cleanup. This is not a new requirement; the previous regulation at § 6213.7 provided "after completing remediation in accordance with the requirements of Chapter 62 a Voluntary Remediating Party may submit a written request for a no-further-action or a case closure letter as set for in § 6211."

While the regulations require VRAP participants to clean up to the same standards, there are benefits for VRAP participants. Rather than requiring a full comprehensive site assessment in accordance with § 6205, VRAP participants can submit a corrective action plan immediately after application approval if the proposed development will remove most source material through excavation activities. Furthermore, VRAP participants are required only to address contamination on the site being redeveloped and are not required to remediate contamination that has migrated onto neighboring property; provided, however, that DOEE may deny approval of a

VRAP application if the proposed corrective action would allow source material on the property being redeveloped to continue leaching contaminants onto neighboring property. Finally, a VRAP participant may withdraw from the program at any time, provided they comply with the requirements of § 6212.7. Following implementation of an approved corrective action plan, the VRAP participant receives a no further action or case closure letter that may be used to provide assurance to investors, purchasers, or occupants that the site complies with environmental standards. While DOEE cannot require a party who is not responsible for contamination of a site to remediate, it cannot, in good conscience, issue a no further action or case closure letter without the site meeting the standards of Chapter 62 to be protective of human health and the environment.

26. ***6212.2(c)*** *The financial mechanisms set forth in the regulations were designed for ensuring that responsible parties regulated under the UST regulations do not abandon their remedial obligations for contaminating sites in the District. But these mechanisms are, for the most part, antiquated and particularly ill-suited for the VRAP program. VRAP participants are voluntarily absorbing remedial obligations and are permitted to halt their participation in the cleanup so long as they comply with certain obligations, including, among others, stabilizing the site. Unlike responsible parties that have often abandoned their properties and underground storage tanks, VRAP participants have a vested interest in finalizing the corrective action and closing the VRAP to finish their redevelopment. Even if the participants choose not to perform the corrective action, VRAP participants will be required to stabilize the site to move forward with their redevelopment. Thus, financial mechanisms are arguably not even necessary for these volunteers. Regardless, DOEE should arrange a meeting with the regulated community to discuss the types of mechanisms that are better suited for the VRAP program.*

The requirement to provide financial assurance has not changed from existing regulations, with the exception of a clarification that any of the financial assurance mechanisms described in § 6701 may be used. Thus, the commenter's objection to the requirement for financial assurance is outside the scope of this rulemaking. Furthermore, the Department has required financial assurance since the inception of the VRAP program to ensure funding is available to secure and stabilize a site if the VRAP participant withdraws from the program without meeting its obligations. With respect to the type of mechanisms available, Chapter 67 provides a broad range of financial assurance mechanisms and templates that VRAP participants have successfully modified for use under the VRAP.

27. ***6212.2(f)*** *DOEE 'S Proposed Rules Inexplicably Make the Process for Applying to Voluntarily Remediate Contamination in the District Significantly More Burdensome*

The VRAP is perhaps the best example in the District of how a regulatory program can produce "win-win" results, in the case of the VRAP leading to a party voluntarily cleaning up contamination for which it has no legal

> *responsibility or liability—and for which a workable cleanup solution may not otherwise exist—as part of a redevelopment project that also improves the prosperity of the District. Nevertheless, DOEE is inexplicably proposing to amend 6212 to make the process for applying to the VRAP more difficult. First, 6212.2(f) would require an applicant to the VRAP to provide DOEE with "any available documentation demonstrating that the applicant is not a responsible party." If DOEE believes that it could process VRAP applications more effectively if applicants were to provide the agency with certain information, such as any records in the applicant's possession showing the history of the site's ownership, then it should specify that it requires that particular information. As proposed, however, 6212(f) would require a prospective VRAP applicant to produce documents proving a negative, which is an impossible and illogical standard.*
>
> *Additionally, newly proposed 6212(g) would prevent a business from filing a VRAP application until it is a registered business in the District. This requirement needlessly imposes additional administrative costs and delays on businesses that are not currently doing business in the District but are considering establishing a business in the District as part of a redevelopment project. This proposed change runs counter to recent efforts by the District to attract new businesses to the city and to promote the District as a business-friendly city.*

The proposed regulation does not require an applicant to prove a negative; it requires the applicant to provide "any available documentation" demonstrating that the applicant is not a responsible party. In order to approve a VRAP application (and give the applicant the benefit of not performing a full site assessment or remediating contamination that has migrated off the property being developed) DOEE must determine that the applicant is not a responsible party. Having any information available to the applicant that will support that determination will help DOEE make the necessary determination more quickly.

Section 6212(g) incorporates a requirement of district law that entities doing business in the District must register. Pursuant to D.C. Code § 29-105.02, "[a] foreign filing entity or foreign limited liability partnership shall not do business in the District until it registers with the Mayor under this chapter." In order to be eligible for VRAP, a person must meet one of the following criteria:

> (a) Intends to develop the LUST facility or site for personal or business reasons;
>
> (b) Intends to conduct a phased investigation of the conditions at the LUST facility or site prior to acquiring or developing the LUST facility or site; or
>
> (c) Is a neighboring property owner who is unable to obtain relief from the responsible party.

Each of these criteria would indicate that the applicant either currently or soon intends to do business in the District. Requiring the entity to register with the Department of Consumer and Regulatory Affairs to ensure compliance with the legal requirement is not burdensome.

28. ***6212.9(b)*** *DOEE Proposes to Establish Counterproductive "Use it or Lose It" Implementation Dates for Parties Conducting Voluntary Remediation, While Removing Its Own Accountability Deadlines*

When a VRAP applicant agrees to remediate a petroleum-contaminated site for future personal or business reasons, it rarely agrees to be designated as a "responsible party" and to take on the corrective action obligations of the responsible party. Similarly, the existence of a VRAP applicant does not diminish the legal duties of the responsible party to conduct appropriate corrective actions at the site or diminish the legal authority of DOEE to force the responsible party to take such actions. A typical VRAP applicant fills a void created as a result of two factors: 1) responsible parties are frequently unknown or financially unable to conduct corrective action; and 2) DOEE lacks the resources to force viable responsible parties to conduct corrective action and lacks the financial resources to fund the cleanups unilaterally. In this reality, a VRAP applicant's offer to conduct remediation activities at a contaminated site present the best—and often only—pathway forward.

The willingness of a VRAP applicant to conduct remediation activities at a contaminated site is directly tied to the applicant's ability to develop the site for its commercial or personal uses. As with any redevelopment project, numerous issues can give rise to delay VRAP cleanup efforts, ranging from permitting or zoning challenges, delays in securing financing, or unexpected changes in market demand.

Instead of being thankful for the important role that VRAP applicants play in cleaning up contamination that has in many cases lingered for decades, DOEE's proposed rule at 6212.9(b) brings to mind the old adage that one should "not look a gift horse in the mouth." The rule would allow DOEE to revoke a VRAP application if the voluntary remediating party "fails to begin, or actively implement corrective action by the anniversary date of approval of the VRAP application, or stops corrective action for more than twelve (12) months, unless otherwise authorized by the Department." The proposed rule demonstrates a lack of understanding of the realities of the challenges that redevelopment projects face, with delays that often arise from events that are beyond the control of the voluntary remediating party.

The Department disagrees with the commenter's suggestion that LUST remediation only occurs through the VRAP. Of the Department's 1884 LUST cases as of November 2019, only 92, or 5%, have had a voluntary remediating party enrolled in VRAP.

As noted above, long delays in implementation of VRAP corrective actions have impeded DOEE's ability to hold responsible parties accountable. While the commenter is correct that VRAP does not legally prevent DOEE from requiring corrective action from responsible parties, in reality an open VRAP delays enforcement for several reasons. The VRAP participant has often already purchased the property, requiring the responsible party to negotiate with the participant for access to assess and remediate the property. In addition, the VRAP participant may not want the responsible party conducting assessment and remediation activities that interfere with its development plans and timeline. Accordingly, DOEE needs the ability to revoke a VRAP application if there is no action for an extended period of time.

DOEE appreciates the concern of the commenter that many factors may delay the start of a redevelopment project. Accordingly, DOEE has modified the proposed provision to provide that DOEE may revoke a VRAP application approval if work does not commence or is delayed for more than two years instead of one year. The language of the regulation allows for an extension of the two year period as "authorized by the Department." A participant could also reapply when ready to move forward with development. DOEE has also added language to clarify that this does not prevent DOEE taking immediate action as necessary to address an imminent threat to human health or the environment. Finally, DOEE notes that the revocation authority is discretionary and would likely not be exercised when a voluntary party is making good faith efforts to move forward with remediation.

29. ***6302.4, and 6400.2*** *Section 6302.4 explains DOEE's authority to enter private property and to conduct corrective actions in response to a release that threatens human health or the environment. Similarly, Section 6400.2 lists the types of corrective actions that DOEE may take in such situations. These sections should acknowledge that DOEE can also use activity and use limitations to protect human health in the event of a release.*

Section 6302.4 addresses service of notice prior to the District taking summary corrective action in emergency situations. Section 6400.2 includes that the corrective action may include development and implementation of a corrective action plan under Chapter 62. Activity and use limitations and environmental covenants are addressed under corrective action plans in Chapter 62.

30. ***7099.1*** *The definition for "environmentally sensitive receptor" has a typo, but more over it [is] too vague to be a definition. The use of "other area" or "thing" is too open and could be applied to any material or media. To avoid confusion within the regulated community, consider reverting to some previous language "groundwater and surface waters shall be treated as receptors."*

DOEE generally does not capitalize the word "federal" except in proper names. In the definition "area or thing" is modified by "that can be adversely impacted by exposure to pollution or contamination." This allows for the inclusion of other sensitive receptors, besides the listed locations, that may be identified in a risk assessment.

ATTACHMENTS

Letter to Tommy Wells from Kirk McCauley, Director of Government Affairs, WMDA/CAR Service Station and Automotive Repair Association

Letter to DOEE from Amy L. Edwards, Holland & Knight, LLP

Letter to DOEE from Lisa Maria Mallory, CEO, District of Columbia Building Industry Association

E-mail to DOEE from Ellen Valentino, MAPDA

E-mail to DOEE from Clair Marie Wholean, Archfina

E-mail to DOEE from Stephen Zettlemoyer, Environmental Protection Specialist, USSS-SAF

WORKS CITED

U.S. Environmental Protection Agency, Technical Guide for Addressing Petroleum Vapor Intrusion At Leaking Underground Storage Tank Sites (June 2015), *available at* https://www.epa.gov/sites/production/files/2015-06/documents/pvi-guide-final-6-10-15.pdf

District Department of the Environment, District of Columbia Risk-Based Corrective Action Technical Guidance (Risk-Based Decision Making) (June 2011), *available at* https://www.epa.gov/sites/production/files/2015-06/documents/pvi-guide-final-6-10-15.pdf