

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF WASTE AND HAZARDOUS SUBSTANCES

Statutory Authority: 7 Delaware Code, Chapters 60 and 63; (7 Del.C., Ch. 60 and 63)
7 DE Admin. Code 1302

FINAL

ORDER

1302 Regulations Governing Hazardous Waste

Secretary's Order No.: 2016-WH-0011

RE: Approving Final Regulations to Amend 7 DE Admin. Code 1302:

Delaware Regulations Governing Hazardous Waste

Date of Issuance: March 15, 2016

Effective Date of the Amendment: April 21, 2016

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 Del.C. §§6006, 6010, and 7 Del.C. §6301 *et seq.*, and any other relevant authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to proposed regulation amendments to 7 DE Admin. Code 1302, *Delaware Regulations Governing Hazardous Waste* ("DRGHW"). The Department's Division of Waste and Hazardous Substances, Solid and Hazardous Waste Management Section ("SHWMS"), has conducted this regulatory development process consistent with the requirements of 29 Del.C. Ch. 101, and has commenced said process with Start Action Notice 2015-06 dated July 22, 2015. The Department published its initial proposed regulation amendments in the January 1, 2016 *Delaware Register of Regulations*. The Department then held a public hearing on January 21, 2016. Consistent with 29 Del.C. §10118(a), the public hearing record remained open for public comment through February 5, 2016.

The purpose of this proposed regulatory promulgation is to adopt as final the aforementioned proposed Amendments to the existing DRGHW to enable the Department to provide greater environmental protection and to reduce human health risks. Specifically, the proposed action will allow DNREC to modify the characteristics of ignitability to mirror federal ignitable compressed gas provisions, and to also correct existing typographical and reference errors. It should be noted that the proposed Amendments are required by the United States Environmental Protection Agency ("U.S. EPA") in order for Delaware to maintain its program authorization concerning such matters.

The aforementioned proposed Amendments were presented and thoroughly vetted by the Department at the public hearing on January 21, 2016. Members of the public attended the aforementioned hearing, and comment was received by the Department at that time. Pursuant to Delaware law, the record remained open for fifteen (15) additional days subsequent to the date of the public hearing, for the purpose of receiving additional public comment. Although the record remained open through February 5, 2016, no additional comment was received by the Department concerning this proposed action. It should be noted that, while the public comments received in this matter did pertain to Delaware hazardous waste concerns in general, they did not concern the specific Amendments currently being proposed by the Department, and thus were outside of the scope of the subject matter of this proposed promulgation. The fact that the comments were not relevant to the proposed promulgation is confirmed by the Technical Response Memo from the Solid Hazardous Waste Management Section. It should also be noted that all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated March 15, 2016 ("Report"). The Report documents the proper completion of the required regulatory amendment process, establishes the record, and recommends the adoption of the proposed Amendments as attached to the Report as Appendix "A".

Reasons and Conclusions

Based on the record developed by the Department's experts and established by the Hearing Officer's Report, I find that the proposed regulatory Amendments to 7 DE Admin. Code 1302: *Delaware Regulations Governing Hazardous Waste* are well-supported. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed regulatory amendments be promulgated as final.

I find that the Department's experts in the Division of Waste and Hazardous Substances, Solid and Hazardous Waste

Management Section, fully developed the record to support adoption of these regulatory Amendments. The adoption of these regulatory Amendments will allow Delaware to modify the characteristics of ignitability to mirror federal ignitable compressed gas provisions, and to also correct existing typographical and reference errors.

In conclusion, the following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to the proposed amendments to **7 DE Admin. Code** 1302, pursuant to **7 Del.C.** Ch. 60 and 63;
2. The Department has jurisdiction under its statutory authority, pursuant to **7 Del.C.** Ch. 60, to issue an Order adopting these proposed regulatory amendments as final;
3. The Department provided adequate public notice of the proposed regulatory amendments and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on the proposed regulatory amendments, including at the time of the public hearing held on January 21, 2016, and held the record open through close of business on February 5, 2016, consistent with **29 Del.C.** §10118(a), in order to consider public comment on these proposed regulatory amendments before making any final decision;
4. The Department's Hearing Officer's Report, including its established record and the recommended proposed regulatory Amendments as set forth in Appendix "A", are hereby adopted to provide additional reasons and findings for this Order;
5. Promulgation of the proposed regulatory amendments to **7 DE Admin. Code** 1302: *Delaware Regulations Governing Hazardous Waste*, will enable the Department's SHWMS to (1) modify the characteristics of ignitability to mirror federal ignitable compressed gas provisions; and (2) correct existing typographical and reference errors;
6. The Department has reviewed these proposed regulatory amendments in the light of the Regulatory Flexibility Act, consistent with **29 Del.C.** Ch. 104 (version applicable to all regulations initially published on or before December 31, 2015), and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
7. The Department's proposed regulatory amendments, as published in the January 1, 2016 Delaware *Register of Regulations*, and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they are approved as final regulatory amendments, which shall go into effect twenty days after their publication in the next available issue of the Delaware *Register of Regulations*; and
8. The Department shall submit this Order approving as final the proposed Amendments to **7 DE Admin. Code** 1302: *Delaware Regulations Governing Hazardous Waste* to the Delaware *Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

David S. Small, Secretary

1302 Regulations Governing Hazardous Waste

NOTE: For the purposes of this amendment package only those sections of the hazardous waste regulations shown herein are affected. The remaining sections of the DRGHW are not affected and are unchanged. Proposed additions are indicated with underlines, and deletions are indicated with ~~strikethroughs~~.

AMENDMENT 1:

Background:

Delaware proposes to modify DRGHW to mirror the federal provisions regarding characteristics of ignitability.

Section 261.21 Characteristics of Ignitability.

(a) A solid waste exhibits the characteristic of ignitability if a representative sample of the waste has any of the following properties:

(1) It is a liquid, other than an aqueous solution containing less than 24 percent alcohol by volume and has flash point less than 60°C (140°F), as determined by a Pensky-Martens Closed Cup Tester, using the test method specified in ASTM Standard D-93-79 or D-93-80 (incorporated by reference, see §260.11), or a Setafash Closed Cup Tester, using the test method specified in ASTM Standard D-3278-78 (incorporated by reference, see §260.11).

(2) It is not a liquid and is capable, under standard temperature and pressure, of causing fire through friction, absorption of moisture or spontaneous chemical changes and, when ignited, burns so vigorously and persistently that it creates a hazard.

(3) It is an ignitable compressed gas as defined in 49 CFR Part 173 and as determined by the test methods described in that regulation.

(i) The term "compressed gas" shall designate any material or mixture having in the container an absolute pressure exceeding 40 p.s.i. at 70°F or, regardless of the pressure at 70°F, having an absolute pressure exceeding 104 p.s.i. at 130°F; or any liquid flammable material having a vapor pressure exceeding 40 p.s.i. absolute at 100°F as determined by ASTM Test D-323.

(ii) A compressed gas shall be characterized as ignitable if any one of the following occurs:

(A) Either a mixture of 13 percent or less (by volume) with air forms a flammable mixture or the flammable range with air is wider than 12 percent regardless of the lower limit. These limits shall be determined at atmospheric temperature and pressure. The method of sampling and test procedure shall be acceptable to the Bureau of Explosives and approved by the director, Pipeline and Hazardous Materials Technology, U.S. Department of Transportation (see Note 2).

(B) Using the Bureau of Explosives' Flame Projection Apparatus (see Note 1), the flame projects more than 18 inches beyond the ignition source with valve opened fully, or, the flame flashes back and burns at the valve with any degree of valve opening.

(C) Using the Bureau of Explosives' Open Drum Apparatus (see Note 1), there is any significant propagation of flame away from the ignition source.

(D) Using the Bureau of Explosives' Closed Drum Apparatus (see Note 1), there is any explosion of the vapor-air mixture in the drum.

(4) It is an oxidizer as defined in 49 CFR Part 173. An oxidizer for the purpose of this subchapter is a substance such as a chlorate, permanganate, inorganic peroxide, or a nitrate, that yields oxygen readily to stimulate the combustion of organic matter (see Note 4).

(i) An organic compound containing the bivalent -O-O- structure and which may be considered a derivative of hydrogen peroxide where one or more of the hydrogen atoms have been replaced by organic radicals must be classed as an organic peroxide unless:

(A) The material meets the definition of a Class A explosive or a Class B explosive, as defined in §261.23(a)(8), in which case it must be classed as an explosive.

(B) The material is forbidden to be offered for transportation according to 49 CFR 172.101 and 49 CFR 173.21.

(C) It is determined that the predominant hazard of the material containing an organic peroxide is other than that of an organic peroxide, or

(D) According to data on file with the Pipeline and Hazardous Materials Safety Administration in the U.S. Department of Transportation (see Note 3), it has been determined that the material does not present a hazard in transportation.

(b) A solid waste that exhibits the characteristic of ignitability has the EPA Hazardous Waste Number of D001.

Note 1: A description of the Bureau of Explosives' Flame Projection Apparatus, Open Drum Apparatus, Closed Drum Apparatus, and method of tests may be procured from the Bureau of Explosives.

Note 2: As part of a U.S. Department of Transportation (DOT) reorganization, the Office of Hazardous Materials Technology (OHMT), which was the office listed in the 1980 publication of 49 CFR 173.300 for the purposes of approving sampling and test procedures for a flammable gas, ceased operations on February 20, 2005. OHMT programs have moved to the Pipeline and Hazardous Materials Safety Administration (PHMSA) in the DOT.

Note 3: As part of a U.S. Department of Transportation (DOT) reorganization, the Research and Special Programs Administration (RSPA), which was the office listed in the 1980 publication of 49 CFR 173.151a for the purposes of determining that a material does not present a hazard in transport, ceased operations on February 20, 2005. RSPA programs have moved to the Pipeline and Hazardous Materials Safety Administration (PHMSA) in the DOT.

Note 4: The DOT regulatory definition of an oxidizer was contained in §173.151 of 49 CFR, and the definition of an organic peroxide was contained in paragraph 173.151a. An organic peroxide is a type of oxidizer.

AMENDMENT 2:

Background:

Delaware proposes to modify DRGHW to correct an incorrect reference. DRGHW § 262.21 is reserved, as Delaware has elected not to issue manifest numbers or print hazardous waste manifests. Rather, the approval for this function remains at the federal level.

Section 262.20 General Requirements.

(a) (1) ...

(2) The revised manifest form and procedures in §§260.10, 261.7, 262.20, ~~262.24~~, 262.27, 262.32, 262.34, 262.54, 262.60, and the appendix to part 262 of these regulations, and 40 CFR § 262.21 shall not apply until September 5, 2006. The manifest form and procedures in §§260.10, 261.7, 262.20, 262.21, 262.32, 262.34, 262.54, 262.60, and the Appendix

to part 262, contained in parts 260 to 265, edition revised as of July 1, 2004, shall be applicable until September 5, 2006.

AMENDMENT 3:

Background:

Delaware proposes to modify DRGHW to correct an incomplete reference.

Section 261.6 Special requirements for hazardous waste which is used, re-used, recycled or reclaimed.

(a) (1) ...

(2) The following recyclable materials are not subject to the requirements of this section but are regulated under Subparts C through N of Part 266 of these regulations, Subpart E of Part 263, and all applicable provisions in Parts 268, 122 and 124 of these regulations:

- (i) Recyclable materials used in a manner constituting disposal (Part 266, Subpart C);
- (ii) Hazardous wastes burned (as defined in section 266.100(a)) in boilers and industrial furnaces that are not regulated under Subpart O of Part 264 or 265 of these regulations (Part 266, Subpart H);
- (iii) Recyclable materials from which precious metals are reclaimed (Part 266, Subpart F);
- (iv) Spent lead-acid batteries that are being reclaimed (Part 266, Subpart G). Note: Spent lead-acid batteries destined for reclamation are not subject to the transporter permitting requirements of Part 263.

AMENDMENT 4:

Background:

Delaware proposes to modify DRGHW to change an incorrect preposition and mirror the federal regulations.

Section 264.151 Wording of Instruments.

...

(n)(1) ... STANDBY TRUST AGREEMENT

...

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a standby trust fund,... except that the Fund is not established for the benefit of third parties for the following:

...

(e) Property damage to:

- (1) Any property owned, rented, or occupied by [insert Grantor];
- (2) Premises that are sold, given away or abandoned by [insert Grantor] if the property damage arises out of any part of those premises;
- (3) Property loaned ~~to~~ by [insert Grantor];

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