

Report From Agency

# RULE REPORT

## Department of Commerce

Clearinghouse Rule No.: 07-029

Rule No.: Chapters Comm 2, 10, 14, 47 and 48

Relating to: Flammable, Combustible and Hazardous Liquids

Contact person for substantive questions:

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1. Basis and purpose of the proposed rule.

Under chapter 101 of the Statutes, the Department has a responsibility to adopt and administer rules for safe storage, handling and use of flammable, combustible and hazardous liquids – and uniform procedures for reporting the location of aboveground and underground storage tanks for these liquids. Many of the proposed changes from the current code requirements are intended to incorporate updated versions of adopted national standards, address advances in technology, remove obsolete deadline requirements, and streamline administrative processes. Other changes are designed to address current trends and practices, emphasize life safety and fire safety requirements, clarify ambiguous requirements, provide consumer protection, and achieve compliance with recently enacted federal requirements. Some new requirements have been added to focus environmental protection on the components of a tank system that have been shown to have the greatest potential for releases to the environment. Several changes are included for more clearly showing which requirements apply to existing equipment, and why, rather than applying only to new equipment.

2. How the proposed rule advances relevant statutory goals or purposes.

The proposed rules are primarily intended to establish or refine design, construction, operation and maintenance standards for public safety, and to protect the waters of the state from contamination by liquids that are flammable or combustible or are federally-regulated hazardous substances.

3. Changes to the rule analysis or fiscal estimate that was prepared for public hearing.

The rule analysis was changed to include (1) further justification for providing double-wall construction for underground tanks and piping, (2) further justification for providing additional overfill protection for aboveground and underground tanks, (3) further description of the required annual testing of leak detection equipment for piping, (4) further description of cost-effective methods for providing secondary-containment sumps under dispensers and around fittings, and (4) estimated costs for providing additional overfill protection for underground tanks.

COM-10550 (R.02/04)

# FINAL REGULATORY FLEXIBILITY ANALYSIS

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RELATING TO: Flammable, Combustible and Hazardous Liquids

Final regulatory flexibility analysis not required. (Statement of determination required.)

1. Reason for including or failing to include the following methods for reducing impact of the rule on small businesses: Less stringent compliance or reporting requirements; less stringent schedules or deadlines for compliance or reporting requirements; simplification of compliance or reporting requirements; establishment of performance standards to replace design or operational standards; and exemption from any or all requirements.

Less stringent application, compliance and reporting requirements are not proposed because under section 101.09 (3) (a) of the Statutes, the proposed rules of Clearinghouse Rule 07-029 must provide substantially similar protection for all waters of the State; and under section 101.142 (2) of the Statutes, the rules must include uniform procedures for reporting the location of aboveground and underground storage tanks. The proposed rules are minimum requirements to meet the directives of the Statutes, and any exceptions from compliance for small businesses would be contrary to the statutory objectives that are the basis for the rules.

2. Issues raised by small businesses during hearings, changes in proposed rules as a result of comments by small businesses and reasons for rejecting any alternatives suggested by small businesses.

A substantial number of the issues raised during the public Hearing process may have been raised by or on behalf of small businesses, and addressed topics such as readability, retroactivity, secondary containment, periodic inspections, excessive costs, and leak detection. The Department made significant and numerous changes to the rules in response to the Hearing comments, as detailed in the accompanying Summary of Public Hearing Comments and Agency Response, and these changes include the following:

(1) Wherever requirements would apply retroactively to an existing facility – and wherever they may have been misunderstood to so apply – the rule text has been reviewed and modified where appropriate to more clearly convey which requirements are retroactive, and which are not. (2) Wherever the Hearing draft referred to a required form or financial-responsibility document, the rule text and associated informational notes have been reviewed and modified where appropriate to clearly convey which form or document is needed, and how to obtain it. (3) Wherever the Hearing draft referred to another section of the chapter or to an adopted standard, the cross-reference has been reviewed and modified, or supplemented with informational notes, where appropriate, to specifically describe the requirements that are being referenced, and to identify the specific sections that apply. (4) Wherever the Hearing draft referred to a responsibility of an owner or operator or both, the rule text has been reviewed and modified where needed to clearly convey who has the responsibility. (5) To improve consistency of application, the

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Department's formal appeal process has been expanded to include appealing any Comm 10 enforcement decision by any authorized agent – including a first class city. (6) The tank registration and permitting processes have been extensively clarified. (7) The recordkeeping requirements for aboveground tanks are no longer partly located in the subchapter for underground tanks, and both sets of recordkeeping requirements have been clarified. (8) Criteria for existing sumps and other secondary containment have been clarified to require periodic inspection and maintenance rather than replacement, including where existing sumps are smaller than is required for new sumps. (9) Sumps at existing transitions between aboveground and underground piping are no longer newly required. (10) Requirements for sumps have been clarified to recognize dispenser pans, spray-on liners, brushed-on liners, formed-in-place containment products, and other effective secondary containment practices that are currently in use. (11) Periodic inspections for aboveground steel tanks have been clarified to not apply to heating oil tanks and tanks at farms and construction sites, have been changed to not apply to tank wagons or movable tanks or tank vehicles, and are no longer required for tanks that are smaller than 1,100 gallons. (12) The compliance period for installing overflow protection at existing facilities has been doubled. (13) Requirements for unattended fueling facilities have been changed to apply only to facilities that do not regularly have an attendant on duty on a daily basis, rather than to retail stations which continue to operate dispensers after closing each day – and for existing facilities, an alternative is added for automatically sending a leakage alarm to a facility that is staffed 24 hours a day, 7 days a week, instead of automatically shutting down either the submersible pump or the dispenser operation. (14) Requirements for inventory control, including a 0.5% leak-rate threshold, have been clarified to more clearly apply only where inventory control is used as the leak detection method; and to show that the statistical inventory reconciliation method of leak detection does not include use of the 0.5% threshold. (15) The roles of owners, operators, contractors and delivery personnel in preventing and responding to releases have been clarified.

As further detailed in the accompanying Summary of Public Hearing Comments and Agency Response, several alternatives were suggested but rejected, including the following: (1) Reducing the requirements so as to not exceed corresponding federal requirements was rejected because although the federal requirements address only environmental protection, the proposed rules also address fire safety. (2) Reducing the number of incorporated external standards was rejected because these standards contain best practices as developed through the sharing of experiences and knowledge from an assortment of qualified professionals – and are part of a body of knowledge used by manufacturers, distributors, installers, owners, regulators and service providers alike to achieve important goals and events in a satisfactory manner. Of the 73 standards that are referenced in the rules, 26 are newly referenced; and in contrast, the *International Building Code*<sup>®</sup> and the *International Energy Conservation Code*<sup>®</sup>, which apply to commercial buildings in Wisconsin through chapters Comm 61 to 65, directly reference over 500 industry standards. In addition, many of the standards apply to specific, narrow applications and will likely not be used by owners and operators; and copyright laws generally prevent the alternative of reprinting the standards in the code. (3) Exempting aboveground, fixed, steel storage tanks with capacities of 1,100 to 5,000 gallons from having periodic inspections was rejected because these inspections are required by the corresponding industry standards produced by the National Fire Protection Association (NFPA 30) and the Steel Tank Institute (STI SP001); and because these inspections are required for any facility having tanks with an aggregate capacity of larger than 1320 gallons, by the federal Spill Prevention Control and Countermeasure regulations in 40 CFR 112. For almost all ASTs that have a capacity of 5000 gallons or less, these inspections are only required to be visual, consist of a brief and basic check of the integrity of the tank, can be performed by a noncertified inspector or the owner or operator, and can be based on an optional checklist available from the Department's Web site. (4) Allowing insurance coverage as a substitute for secondary containment was rejected because this option appears unviable, in part because no insurance provider is yet offering such policies. In addition, the coverage would need to be in place for the life of a system, which could be 30 to 50 years, and generally would need to be renewed on a yearly basis – and would need to be carried, at a typical regulated facility, for numerous different components from several different manufacturers, as installed at several different times by several different contractors. (5) Limiting the required secondary containment only to installations within 1,000 feet of a potable water system was rejected because based on the broad federal definition of a potable water supply system, and on input from the Department of Natural Resources, few if any underground tank systems are expected to be more than 1,000 feet from those systems. (6) Deleting a retroactive requirement for secondary containment at dispensers was rejected because the results of a study initiated with the USEPA indicate

over 34% of releases from components for underground storage tank systems occur where connections are made in piping and at dispensers. Because of widespread improvement in otherwise reducing leaks from tanks and piping, these connections are now the single-most susceptible portion of a tank and piping system, for having releases or spillage, other than at the spill buckets that are used during fuel deliveries. Site review staff in the Department's Petroleum Environmental Cleanup Fund Award (PECFA) program believe that contamination levels which are increasing at current remediation sites or which are appearing in post-remediation monitoring at other sites is the result of migration of under-the-dispenser contamination. Installing containment sumps will allow for detection of leaks, and repair of piping- or component-connection failures before a significant, costly environmental release occurs. (7) Deleting a retroactive requirement for an automatic shutoff, when a tank becomes 95% full, in combination with a warning alarm when a tank becomes 90% full, was rejected because numerous overfill accidents throughout the country have demonstrated the lack of reliability of having only one overfill-prevention mechanism – and in at least one of those accidents, multiple occupants in multiple vehicles were killed when overfilled fuel ignited. Department staff have reported five incidents in Wisconsin in recent years in which overfilling resulted in dangerous quantities of spilled fuel. In addition, internal tank inspections have identified a significant number of tanks where the overfill-warning mechanism deteriorated to an unreliable state. (8) Expanding the tightness-testing exemption for residential heating oil tanks that have a capacity of less than 1,100-gallons, to instead apply to all heating oil tanks that have a capacity of less than 1,100-gallons was rejected because the current exemption, which applies to tanks installed before October 29, 1999, exists only because it is mandated by section 101.09 (2) (cm) of the Statutes. In addition, as of July 31, 2007, the Department's PECFA program had reimbursed 1,287 claims for cleanup of discharges from home heating oil tanks, at a cost of over \$7 million. (9) Deleting a requirement to clean a tank before filling it with ethanol-based fuel, after gasoline has been stored in the tank, was rejected because this suggestion is contrary to what the ethanol industry recommends in its *Handbook for Handling, Storing, and Dispensing E85*, and to what is known from experience with transitioning to ethanol or bio blends.

3. Nature and estimated cost of preparation of any reports by small businesses.

The reports newly required by the proposed rules are (1) a form for summarizing repairs and modifications to aboveground tanks (form ERS 10873), which is to be kept onsite and made available to inspectors; (2) a notification to the Department of any repairs or changes that are made to a tank system because of a release; and (3) a form for summarizing tank-system site assessments (Part B of form ERS 8951), which is to be filed with the owner or operator, and which is to be filed with the Department of Natural Resources if the assessment is performed because of either a tank removal or a release that must be reported to the DNR.

4. Nature and estimated cost of other measures and investments required of small businesses.

The nature and estimated costs of other measures and investments that may be incurred by small businesses in complying with new requirements in the proposed rules are summarized in the Rule Summary which immediately precedes the proposed rules. In addition, the Department presented a more detailed overview of these measures and investments – and the estimated costs, as generated by industry representatives – to the Small Business Regulatory Review Board on May 14, 2007. The Department has not received any substantiated, conflicting cost estimates in response, either during the Hearing process or in conjunction with the presentation to the Review Board.

5. Additional cost to agency of administering or enforcing a rule which includes any of the methods in 1. for reducing impact on small businesses.

None of the methods listed in 1. for reducing small-business impacts are included in the proposed rules.

6. Impact on public health, safety and welfare caused by including any of the methods in 1. for reducing impact on small businesses.

None of the methods listed in 1. for reducing small-business impacts are included in the proposed rules.

# RESPONSE TO LEGISLATIVE COUNCIL CLEARINGHOUSE REPORT

## Department of Commerce

CLEARINGHOUSE RULE NO.: 07-029

RULE NO.: Chapters Comm 2, 10, 14, 47 and 48

RELATING TO: Flammable, Combustible and Hazardous Liquids

Agency contact person for substantive questions.

Name: Sam Rockweiler

Title: Code Development Consultant

Telephone No. 266-0797

Legislative Council report recommendations accepted in whole.

Yes

No

1. Review of statutory authority [s. 227.15(2)(a)]

a.  Accepted

b.  Accepted in part

c.  Rejected

d.  Comments attached

2. Review of rules for form, style and placement in administrative code [s. 227.15(2)(c)]

a.  Accepted

b.  Accepted in part

c.  Rejected

d.  Comments attached

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3. Review rules for conflict with or duplication of existing rules [s. 227.15(2)(d)]

- a.  Accepted
- b.  Accepted in part
- c.  Rejected
- d.  Comments attached

4. Review rules for adequate references to related statutes, rules and forms [s. 227.15(2)(e)]

- a.  Accepted
- b.  Accepted in part
- c.  Rejected
- d.  Comments attached

5. Review language of rules for clarity, grammar, punctuation and plainness [s. 227.15(2)(f)]

- a.  Accepted
- b.  Accepted in part
- c.  Rejected
- d.  Comments attached

6. Review rules for potential conflicts with, and comparability to, related federal regulations [s. 227.15(2)(g)]

- a.  Accepted
- b.  Accepted in part
- c.  Rejected
- d.  Comments attached

7. Review rules for permit action deadline [s. 227.15(2)(h)]

- a.  Accepted
- b.  Accepted in part
- c.  Rejected
- d.  Comments attached