



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue  
Seattle, WA 98101

January 10, 2006

Reply to  
Attn of: ORC-158

**MEMORANDUM**

**SUBJECT:** Review of Alaska's Dual Purpose Tank Policy

**FROM:** Deborah E. Hilsman  
Office of Regional Counsel

**TO:** Robert Cutler  
Office of Compliance and Enforcement  
Groundwater Protection Unit

By email message sent to me on November 18, 2005, you requested that I review Alaska's Dual Purpose Tank Policy to determine if it is consistent with federal statute, regulations, and interpretations or would jeopardize state program approval (SPA) of Alaska's underground storage tank (UST) program.

Upon reviewing the UST statute, regulations, and EPA policy documents, I conclude that Alaska's Dual Purpose Tank Policy is inconsistent with federal law and would make Alaska's UST program less broad in scope than the federal program. This would jeopardize the state's ability to obtain state program approval, should the state apply for such approval in the future for its petroleum UST program.

EPA's Interpretation of the Heating Oil Exemption

Statutory Language and Regulatory Definitions

Section 9001(1)(B) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), defines the term "underground storage tank" as excluding any "tank used for storing heating oil for consumptive use on the premises where stored..." 42 U.S.C. § 6991(1)(B). This provision (commonly referred to as the "heating oil tank exclusion" or "heating oil tank exemption") does not limit the use of heating oil on the premises where stored nor does it make reference to heating oil substitutes. Congress did not define "heating oil" in the statutory definitions, but left it to EPA to define this and other important terms through regulation.

In the federal UST regulations issued in 1988, EPA defined three key terms used in Section 9001(1)(B). In the 40 C.F.R. Part 280 regulations, EPA defined the term “heating oil” to mean:

petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy; No. 5-light; No. 5-heavy; No. 6 technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

40 C.F.R. § 280.12. With respect to heating oil, EPA further defined the term “consumptive use” to mean “consumed on the premises” and “on the premises where stored” to mean “UST systems located on the same property where the stored heating oil is used.” 40 C.F.R. § 280.12.

EPA elaborated on the meaning of these definitions in the 1988 preamble to the UST regulations at 53 Fed. Reg. 37082 (September 23, 1988). On page 37117 of the preamble, EPA provided responses to commenters who questioned EPA’s proposed definition of heating oil as including “either one of the eight technical grades of fuel oil (No. 1, No. 2, No. 4-light, No. 4-heavy; No. 5-light; No. 5-heavy; No. 6 and residual) or fuel oil substitutes such as kerosene or diesel when used for heating purposes.” Some commenters stated that both No. 2 diesel fuel and kerosene should be included as heating oil because their chemical makeup is similar to each other and No. 2 fuel oil; while other commenters thought that the exclusion should not be limited to oil used for heating purposes. In response, EPA declined to list diesel or kerosene as one of the technical grades of fuel oil, but agreed that the heating limitation in the proposed rule was inconsistent with the statutory language of the exclusion that limits “use” only by requiring “consumptive” use. While acknowledging that the final rule definition of heating oil is not limited to fuels used for heating, EPA went on to state that “[t]he exclusion does, however, limit the use of substitutes to those situations where the substitute is actually used in place of one of the technical grades of fuel oil.” 53 Fed. Reg. 37117. As part of this discussion, EPA indicated that a tank that stores diesel fuel for an on-site motor generator is an example of a tank that is not a heating oil tank stating as follows:

Even though diesel fuel is sometimes burned in boilers as a substitute for heating oil, it is the fuel of choice for internal combustion engines. It is, thus, not a substitute for one of the technical grades of heating oil in this situation.

53 Fed. Reg. 37117.

In discussing the “consumptive use” definition on page 37117, EPA also clarified that tanks holding heating oil for any on-site use, such as heating or to power a generator, are exempt from regulation. But in response to several commenters who argued that tanks storing diesel fuel for use in emergency generators should be exempt as tanks storing heating oil, EPA declined to declare such tanks as exempt and merely restated

that no restrictions are being placed on the use of heating oil under the exclusion, except that it be used consumptively on-site. 53 Fed.Reg. 37118.

### EPA Guidance Documents

EPA has further clarified the scope of the heating oil exemption in regulatory guidance distributed on November 27, 1992 in a manual entitled “Technical and Regulatory Interpretation Requests: Process, Criteria, and Suggested Format” (guidance manual). In Chapter 1 of the guidance manual entitled “Applicability, Definitions and Notification” (ADN), EPA indicated that in 1990, it received referrals from several EPA regions asking for clarification of the heating oil tank exemption. EPA responded by issuing ADN-10 entitled “Does my tank qualify for the heating oil tank exemption?” (attached). ADN-10 is a decision tree with notes that asks three basic questions: 1) Are the contents consumed on the premises where stored?; 2) Does the tank store fuel oil number 1, 2, 4, 5, 6 or residual fuel oil?; and 3) Are the contents used as a substitute for fuel oil?. In ADN-10, EPA noted that heating and power generation can both meet the requirement that the contents of the tank be consumed on the premises where stored. But when addressing the question of whether the contents of a tank could be used as a substitute for fuel oil, EPA noted that the reader must consider whether the equipment is designed to burn primarily fuel oil or whether fuel oil is the fuel of choice for this situation. In ADN-10 EPA notes, for example, that boilers are usually designed to burn fuel oil and small diesel motor generator sets are usually designed for diesel fuel. In ADN-10, EPA also cites to the circumstance where diesel fuel is used in a boiler and sometimes used in a diesel motor generator set. The decision tree reflects that a “sometimes” response to the question of whether the contents are used as a substitute for fuel oil indicates that the tank does not qualify for the exemption.

ADN-24 (also attached) addresses an undated general question describing the situation where a company stores diesel fuel in an underground tank and the diesel fuel is burned as a substitute for heating oil in an on-site furnace. EPA responded that

an underground tank storing diesel fuel will meet the exclusion if the diesel fuel will be substituted for heating oil; i.e., burned in a unit designed to use heating oil. ... If on the other hand, the diesel fuel is being used for some other purpose, such as to power an internal combustion engine or an emergency generator, the tank would not meet the exclusion.

See p.7 of the guidance manual. In ADN-24, EPA acknowledges the complexity of the question of whether tanks associated with emergency power generators are excluded from the UST definition under the heating oil exclusion and refers the reader to the discussion of emergency generator tanks on page 37118 of the 1988 preamble. It also acknowledges that the discussion on page 37118 of the preamble does not incorporate or address the stipulation that USTs containing fuels other than heating oil are only exempt if the fuel is burned as a substitute for heating oil in units designed for heating oil and

advises the reader to consult the language on page 37117 for tanks containing other fuels such as diesel fuel.

Upon reviewing these two ADNs in conjunction with the 1988 preamble, EPA Region 10 concluded that a tank that contains diesel oil being used as a substitute for fuel oil in equipment designed to burn fuel oil is exempt from regulation under the heating oil exemption, so long as the diesel oil is being consumed on the premises where stored. In those instances, the diesel fuel is acting as a substitute for one of the listed technical grades of fuel oil and is therefore, a heating oil substitute, whether the diesel fuel is being used for heating or power generation purposes. But when a tank holds diesel fuel being used part of the time as a substitute for fuel oil in equipment designed to burn fuel oil and part of the time as diesel fuel for an emergency generator designed to run on diesel fuel, then the tank is not exempt from regulation under the heating oil exemption. During the times that the diesel fuel is being used to run emergency generators designed to run on diesel fuel, the diesel fuel is not acting as a heating oil substitute and this dual purpose tank would be placed under the “sometimes” category on the decision tree in ADN-10. EPA’s Office of Underground Storage Tanks and Office of General Counsel have concurred with the Region’s interpretation of the heating oil exemption as it applies to dual purpose tanks and the Region conveyed this interpretation to the Alaska Department of Environmental Conservation (ADEC) several years ago.

#### ADEC’s Policy on the Status of Dual Purpose Tanks

On June 16, 2000, ADEC issued a policy document (attached) clarifying the status of dual purpose tanks by stating that an “UST system used for storing diesel fuel or heating oil that is used for both on-premises heat and emergency power (called “dual purpose”) is no longer regulated by DEC.” According to the policy document, ADEC issued this policy because ADEC is generally unable to differentiate heating oil from diesel fuel that is used as a heating oil substitute in dual tanks because of the heating oil and diesel fuel characteristics and uses in Alaska. In the policy document, ADEC states:

Because of this inability, DEC has determined that it would be consistent with federal and state statutes and regulations to treat a dual use tank used primarily for heating as using heating oil, even if also used for emergency power where diesel is used as a heating oil or heating oil substitute. Therefore a dual purpose tank used primarily for heating will not be treated as a regulated UST under 18 AAC 78, all the fuel from the tank is used for consumptive purposes on the premises where the fuel is stored.

See page 1 of the policy. The policy further states that “DEC will no longer treat dual use tanks using diesel fuel primarily as a heating oil substitute as regulated USTs.”

ADEC’s interpretation of a “heating oil substitute” appears to be based primarily on the similarity of the chemical composition of diesel fuel to one of the technical grades of fuel oil that constitute heating oil, and the difficulty in differentiating them. Neither Congress in the statutory language, nor EPA in its regulations and guidance based the

exemption on the chemical composition of the fuel used. Congress recognized that heating oil tanks may require some regulation in the future, as evidenced by the requirement in Section 9009(d) of RCRA for EPA to study heating oil tanks and make recommendations on regulation. See 53 Fed. Reg. 37118. The chemical composition of heating oil clearly did not provide the basis for the exemption and the chemical composition of the fuel used is not the determining factor as to whether a fuel is a heating oil substitute. Under ADN-10 and the preamble language the determining factor is whether the fuel is being used in equipment designed to use heating oil and is therefore actually substituting for the heating oil in its consumptive use on the premises where store. ADEC's policy does not address the question of equipment design at all.

Further, ADEC's statement that it will no longer regulate dual use tanks using diesel fuel primarily as a heating oil substitute recognizes that, at times, such diesel fuel will be used as something other than a heating oil substitute. This is clearly inconsistent with EPA's interpretation of the exemption. ADEC's unwillingness to regulate USTs containing diesel fuel that is used primarily for on-premises heating but also runs an on-premises emergency power generator for providing power (Example 2 on page 1 of the policy) is inconsistent with the federal requirement that the UST contain a heating oil or heating oil substitute to fall within the exemption. The exemption does not apply when the UST contains fuel used "primarily" (or sometimes) as a heating oil substitute; the fuel in the UST must always be used as heating oil or a heating oil substitute.

#### EPA's State Program Approval Requirements

Under the UST state program approval requirements in Section 9004(a) of RCRA and 40 C.F.R. § 281.12, a state can develop an UST program to regulate either petroleum tanks, hazardous substance tanks, or both. Depending upon which of these options a state chooses, its program must cover at least the same categories of tanks as the federal program. When reviewing a state program approval application, EPA not only looks at the stringency of the state's UST requirements, but also the scope of the state's UST program. Scope refers to whether or not the state program addresses the same UST system universe and applies requirements to that universe for each of the elements in the federal program. EPA State Program Approval Handbook, OSWER Directive 9650.11 (SPA Handbook), page 7. For a state program to be as broad in scope as the federal program, it must demonstrate that it covers the same UST systems and does not exclude UST systems regulated under the federal rule. See p. 65 – 67 of the SPA Handbook.

The definition of an "underground storage tank" is one of the key definitions that define a program's scope; if this definition differs markedly from the federal definition, then the state program may not be sufficiently broad in scope for state program approval. See page 66 of the SPA Handbook. The State defines the term "underground storage tank" to mean:

one or a combination of stationary devices, including underground pipes connected to the devices, that is designed to contain an accumulation of petroleum, the volume of which including the volume of the underground pipes, is

10 percent or more beneath the surface of the ground, except that the term does not include a:

....(B) tank used for storing heating oil for consumptive use on the premises where stored ....

AS 46.03.450(12). (See also the State's UST regulations at 18 AAC 78.005.) With the exception of the reference to containing petroleum, this definition closely mirrors the federal definition of an UST.

The State definition of heating oil is almost identical to the federal definition. It states that:

“heating oil” means petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy; No. 5-light; No. 5-heavy; No. 6 technical grades of fuel oil; other residual fuel oils including Navy Special Fuel Oil and Bunker C; and other fuels if used as a substitute for one of the fuels listed in this paragraph; “heating oil” is typically used in the operation of heating equipment, boilers, or furnaces.

18 AAC 78.995(75). It therefore appears (subject to Alaska Attorney General confirmation) that the State has the legal authority to regulate dual use tanks that contain petroleum. But ADEC's interpretation of the heating oil exemption as excluding all dual use tanks from regulation may effectively limit the state's jurisdiction over dual use tanks, making Alaska's petroleum UST program less broad in scope than the federal petroleum UST program.

Even were the policy determined to not be a legal limitation of the State's jurisdiction over dual use tanks (again, the Alaska AG's office would have to weigh in on the legal effect of ADEC's policy statement), the State's failure to regulate dual use tanks would limit its ability to demonstrate that it meets the general requirements for approval listed in 40 C.F.R. § 281.11(a). That regulation requires a state in its SPA application to address the applicable requirements for all existing and new underground storage tanks (new UST systems design construction, installation and notification; upgrading of existing USTs; general operating requirements; release detection; release reporting; investigating and confirmation; out-of-service USTs and closure; release response and corrective action; and financial responsibility). It also requires a state to provide for adequate enforcement of these requirements. By failing to regulate dual use tanks, ADEC would be unable to demonstrate that it meets the objectives in 40 C.F.R. §§ 281.30 - 281.37 for all of its petroleum USTs, nor could it meet the adequate enforcement of compliance requirements in 40 C.F.R. §§ 281.40 - 281.42.

While the scope of Alaska's program can be limited to petroleum USTs only and can therefore be a partial state program under 40 C.F.R. § 281.12, the State must regulate all petroleum USTs in order to qualify for state program approval and cannot categorically exclude petroleum USTs that are regulated under federal law.

EPA understands the use of enforcement discretion when addressing any particular compliance scenario and recognizes that ADEC can use enforcement discretion when dealing with dual use tanks. But ADEC cannot categorically exclude petroleum USTs that EPA regulates and expect to obtain state program approval of its petroleum UST program. ADEC's policy removes all discretion and effectively removes these tanks from the UST universe to be regulated by ADEC.

Hopefully this responds to your question. Please contact me at 206-553-1810, if you have any follow-up questions. This memo can be forwarded to ADEC. I am also available to discuss this memo with the Alaska Assistant Attorney General working with ADEC on this issue and am willing to consider any legal analysis the AAG wishes to provide which supports ADEC's position that its Dual Purpose Tank policy is consistent with federal law and should not impede state program approval of Alaska's petroleum UST program.