

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Department of Commerce, Division of State Fire Marshal-BUSTR

Regulation/Package Title: Underground Storage Tank Rules

Rule Number(s): 1301:7-9-01, 1301:7-9-02, 1301:7-9-03, 1301:7-9-04, 1301:7-9-05,
1301:7-9-06, 1301:7-9-07, 1301:7-9-09, 1301:7-9-10, 1301:7-9-11, 1301:7-9-12, 1301:7-9-
13, 1301:7-9-14, 1301:7-9-15, 1301:7-9-16, 1301:7-9-17, 1301:7-9-18, 1301:7-9-19

Date: April 17, 2017

Rule Type:

☒ New

☒ Amended

☒ 5-Year Review

☒ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

The State Fire Marshal ("SFM"), Bureau of Underground Storage Tank Regulations ("BUSTR") is authorized by ORC 3737.87, et seq. to administer the state's underground storage tank ("UST") program on behalf of U.S. EPA. These regulations direct owners and operators of USTs on all aspects of managing USTs that contain regulated substances, primarily petroleum products but also including hazardous substances. The rules describe

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aspects of the program including registration, operation, maintenance, permitting, installation and removal of USTs, corrective actions, handling of petroleum contaminated soil, certification of tank installers and inspectors, operator training, and delivery prohibition.

This rulemaking is occasioned by the five-year review and includes a number of updates that became necessary when the federal rules upon which most of this agency's rules are based were themselves updated in 2015 (those federal rules had not been amended since their original adoption in 1988). Other amendments are being proposed to update the rules generally, to clarify existing requirements, and to correct formatting and style issues. Three of the rules are being rescinded and replaced due to the amount of changes to the text. Two others are being rescinded without replacement because they are no longer necessary. A brief summary of the changes follows (all rules have had formatting/style updates):

1301:7-9-01 Applicability.

- Certain types of UST systems had been exempt or been deferred from federal regulation since 1988. Those deferrals were removed in 2015, and paragraphs are added to indicate which rules in the chapter are now applicable to those previously-deferred tanks.

1301:7-9-02 Definitions.

- Six terms added; five to comport with federal changes, and one ("sole source aquifer") to accommodate the rescission of rule 1301:7-9-09. Eleven existing terms amended, either to clarify them or to comport with federal changes. One term ("bureau chief") deleted because it is no longer used within the rules.

1301:7-9-03 Reporting requirements for hazardous substances and list of hazardous substances.

- Formatting changes and clarifies that where a category of chemical is listed as a hazardous substance, any chemical that falls into that category is included.

1301:7-9-04 Registration of UST systems.

- Clarifies the registration requirements for compartments of a manifolded UST.
- Adds registration requirement for previously (but no longer) exempt UST systems, per rule 1301:7-9-01.

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- Adds requirement to modify a registration for a change of product, but does not levy a fee for such modifications.

1301:7-9-05 Financial responsibility for petroleum underground storage tank systems. (Rescind and Replace)

- Reorganized to improve readability.
- Updated to accommodate minor federal rule changes that became effective on October 18, 2015.

1301:7-9-06 Design, construction, installation, operation and maintenance for UST systems. (Rescind and Replace)

- Amended to implement new federal requirements for: periodic checks of UST system components, compatibility of UST systems with tank contents, retrofit of older single wall UST systems, qualifications of persons performing work on UST systems, records retention for UST system components, and requirements for airport hydrant and field-constructed systems.
- Updated numerous standards relating to the construction and operation of UST systems to match similar federal standards.
- Removed sensitive area requirements.

1301:7-9-07 Release detection methods and requirements for UST systems. (Rescind and Replace)

- Amend rule to implement new federal requirements for: periodic checks of UST system release detection components, compatibility of release detection systems, methods of UST release detection, qualifications of persons performing work on UST systems, records retention of release detection records, and requirements for release detection on airport hydrant and field-constructed systems.
- Updated numerous standards relating to the construction and operation of UST system release detection to match similar federal standards.
- Removed sensitive area requirements.

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1301:7-9-09 Sensitive areas. (To be RESCINDED)

- The areas deemed sensitive by this rule correspond with federally-designated sole source aquifers. The existing rule uses a township-range-tract identification system, which can be over inclusive. More accurate geographical information now exists for owners and operators to use in determining whether a UST site is located above a sole source aquifer, and can be referenced within the appropriate rules. This rule is therefore no longer needed.

1301:7-9-10 Permits for UST systems.

- Clarifies that partially-exempt UST systems do not require a permit, a certified UST installer, or a certified UST inspector for tank-related activities.
- For regulated UST systems, adds requirement to obtain a permit for a change of product.

1301:7-9-11 Underground storage tank installer certification and training.

- Re-orders the description of activities to be supervised by a certified installer to reflect sequence in which they are normally performed.
- Several clarifying changes to the installer license renewal process.

1301:7-9-12 Out-of-service, closure-in-place, permanent removal, change-in-service, and closure assessment of UST systems.

- Clarifies out-of-service requirements.
- Changes reference from “sensitive area” to “sole source aquifer” to accommodate rescission of Rule 9.
- Adds closure requirements for previously (but no longer) exempt UST systems, per rule 1301:7-9-01.
- Closure sampling requirements for piping clarified and additional samples required to be analyzed for long piping runs.
- Timeframes for initiating closure assessments clarified.
- Closure action levels table updated to reflect current science (see also rule 1301:7-9-13).

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1301:7-9-13 Petroleum UST corrective action.

- Revises applicability section to allow ongoing corrective actions to continue under a previous rule version.
- Definition of “suspected release” amended to match federal version.
- Changes references from “sensitive area” to “sole source aquifer” to accommodate rescission of Rule 9.
- Two new chemicals of concern added for releases from USTs that had been in service prior to 1996 and could have stored leaded gasoline; one new chemical added that is applicable to all USTs in gasoline service.
- Added naphthalene as a chemical of concern for gasoline USTs (it had previously been a chemical of concern only for diesel or kerosene USTs).
- Action levels throughout the rule updated to reflect current science.
- Public notice requirements for certain advanced corrective actions updated and owner/operators required to submit proof of notification within 90 days.
- Voluntary corrective action provisions moved from Rule 14.

1301:7-9-14 Voluntary corrective action. (To be RESCINDED)

- The only purpose for this rule is to authorize persons who are neither owners nor operators to conduct corrective action and to allow BUSTR to issue an NFA letter upon completion. The relevant provisions are moved to Rule 13.

1301:7-9-15 Delegation of authority to inspect UST systems.

- Extend the validity of certification from two to three years.
- The license renewal process simplified and streamlined.
- Allow private inspectors to assess the UST systems of their employers.

1301:7-9-16 Petroleum contaminated soil (PCS).

- Re-use action levels table updated to incorporate most recent science (see also rule 1301:7-9-13).
- Clarifies that if PCS above action levels is returned to the excavation, the cavity must be lined.

1301:7-9-17 Sampling and analysis of excavated soil for the purpose of treatment and disposal.

- Formatting updates only.

1301:7-9-18 Delivery prohibition for USTs.

- Formatting updates and correction of a typographical error only.

1301:7-9-19 Underground storage tank operator training.

- Adds Class A operators to the Class B retraining requirement, but makes retraining discretionary on the part of SFM-BUSTR instead of mandatory.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Rule Number	Authorizing Statute(s)
1301:7-9-01	3737.88(A)
1301:7-9-02	3737.88(A)
1301:7-9-03	3737.88(A), 3737.88(D)
1301:7-9-04	3737.02(A), 3737.88(A)
1301:7-9-05	3737.88(A), 3737.882(B)
1301:7-9-06	3737.88(A)
1301:7-9-07	3737.88(A)
1301:7-9-09	3737.88(A)(2)
1301:7-9-10	3737.88(A)
1301:7-9-11	3737.881(D)
1301:7-9-12	3737.88(A), 3737.882(B)
1301:7-9-13	3737.88(A), 3737.882(B)

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1301:7-9-14	3737.882(B)
1301:7-9-15	3737.88(A)
1301:7-9-16	3737.88(A), 3737.88(E), 3737.882(B)
1301:7-9-17	3737.88(A), 3737.88(E), 3737.882(B)
1301:7-9-18	3737.88(A)
1301:7-9-19	3737.88(A)

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

Yes, this is a federal requirement that Ohio must adopt in order to maintain approval to administer the UST program. The equivalent federal regulations may be found at 40 CFR Part 280.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

None of the rules that are required to implement a federal requirement contain provisions that exceed the federal requirement.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

Compliance with these regulations greatly reduces the number of USTs that leak while in the ground. Such leaks have the potential to contaminate both the soil and groundwater (which can be a source of local drinking water). Additionally, the corrective action rules help assure that when leaks do occur, they are remediated by the appropriate responsible persons in a consistent fashion statewide. Upon completion of remediation, the property is well-positioned for redevelopment, thus providing an important economic benefit.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

SFM-BUSTR has seen a long-term decline in the number of leaking USTs requiring remediation, and since the inception of the program in 1988 has issued 29,625 findings of No Further Action (through the end of 2016), allowing formerly contaminated properties to return

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to productive use. SFM-BUSTR believes that these rule revisions are necessary to ensure that this trend continues.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

SFM-BUSTR contacted the following organizations via e-mail on April 14, 2016, to share its draft set of rule revisions:

Ohio Township Association
Ohio Petroleum Marketers and Convenience Store Association
Ohio Municipal League
Ohio Fire Chiefs' Association
Ohio Environmental Council
Mid-Ohio Regional Planning Commission
County Engineers Association of Ohio
County Commissioners' Association of Ohio
Ohio Department of Development
Ohio EPA

A link to the draft rules was included in the e-mail and the SFM website also publicized the availability of the draft rules. The SFM website included a compendium of the draft changes to existing rule language.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

SFM-BUSTR received comments from eight (8) individuals or companies. The input from the stakeholders was incorporated into a second draft of the regulations. Notice of this second draft was sent on October 13, 2016 to the original list of stakeholders described in Question #7 as well as to any person who had provided comments. Stakeholders were directed to the new draft of the regulations, along with a comment response document, both of which were posted to the SFM website.

Stakeholders were asked to notify SFM-BUSTR if they believed that any significant issues remained to be resolved. A meeting was held on December 19, 2016, to discuss a set of issues raised by three of the stakeholders, and agreement was reached on the rule language regarding those issues.

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Finally, following the October 2016 second draft, SFM-BUSTR received comments from Ohio EPA, which focused on assuring that the two agencies coordinated their approaches to remediation once the rule revisions were adopted. SFM-BUSTR and Ohio EPA discussed the comments via teleconference and agreed that no changes to the draft revisions were necessary.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

Most of the rules are adapted directly from their federal equivalents in 40 CFR Part 280. Revisions to the rules that utilize action levels required the reevaluation of those levels (chemical concentrations above which action is required by the responsible person). SFM-BUSTR utilized Ohio EPA's Chemical Information Database and Applicable Regulatory Standards (CIDARS) to evaluate and set new action levels for the chemicals of concern. CIDARS is the database used by Ohio EPA's Voluntary Action Program. The scientific data in CIDARS is based upon the most current science with respect to the effects of the chemicals, and is drawn from many sources. The action level revisions should be a net benefit to the regulated community because most of the levels were raised. This will allow some sites to avoid corrective action under those new levels.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

Most of the regulations in this package are direct adaptations of their federal equivalents found at 40 CFR Part 280, and SFM-BUSTR believes that it is appropriate to maintain them in their current form. SFM-BUSTR did not receive any input from stakeholders that suggested that an alternative regulatory approach was needed, and consequently determined that retaining the present substance and format for the rules was the correct course.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

While a considerable amount of the rule language is, and is required to be, based on federal rule language, there are important instances where the federal language is not prescriptive, and SFM-BUSTR have included performance-based concepts. In particular, when corrective actions are necessary under OAC 1301:7-9-13, UST owners and operators have the ability in some circumstances to propose a course of action intended to meet the action levels at a site.

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12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The State Fire Marshal, acting through BUSTR, has exclusive jurisdiction over petroleum USTs in Ohio; no other state agency has rules that address such USTs.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

These rules were initially adopted and implemented in this format in the early 1990s, except for rules 1301:7-9-16 and 1301:7-9-17 (1995) and rules 1301:7-9-18 and 1301:7-9-19 (2012). SFM-BUSTR has received no information from UST owners that they have ever been inconsistently or unpredictably applied.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

The primary business community that is affected by these rules are owners of gasoline service stations. Other types of businesses that own USTs are impacted as well; examples of these can include dry cleaners, stand-alone oil change facilities and auto repair shops that perform oil changes, manufacturing facilities, and any business that may fuel vehicles on-site (rental car lots, warehousing facilities, etc.)

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance);

The nature of the adverse impacts includes annual UST registration, maintenance of a financial responsibility mechanism, requirement to obtain a permit before performing significant work on a UST system, maintenance of records, and submission of reports in order to demonstrate compliance, and training employees to properly operate and maintain UST systems. Most of these tasks will require at least a nominal amount of employee time to conduct the tasks and complete the necessary documentation.

c. Quantify the expected adverse impact from the regulation.

The overall impact will vary considerably because it includes not only fixed costs (triennial tightness tests for various components at around \$200 per tank, annual registration fees of \$50 per tank, a permit fee for UST work of \$35 per tank, \$150

application fees for certification as an installer or inspector, etc.), but open-ended costs in the case of corrective action, which are highly dependent on the severity and extent of the contamination. The cost of closure of USTs will vary based on the number of USTs being removed and the amount of piping and dispensers that are taken out along with the tank or tanks. Establishment and maintenance of financial responsibility is variable, too, depending on which assurance mechanism an owner selects. It should be noted, though, that compliance with the financial responsibility rule will allow a UST owner or operator to be reimbursed by the Petro Fund for most corrective action costs.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

A release of petroleum products or hazardous substances to the environment can endanger public health and threaten drinking water sources, and a release from a UST is particularly troublesome because it occurs out of sight and often over a long period of time. Preventing releases and addressing those that do occur are the primary goals of the federal program that the State Fire Marshal, through BUSTR, implements via these rules. This program is the exclusive means by which the state of Ohio can ensure that USTs are installed, operated, and maintained appropriately, consistently, and by trained and qualified personnel; and, when releases do occur, ensure that they are remediated as quickly and as cost-effectively as possible. This allows the property to return to beneficial use and promotes redevelopment. BUSTR believes that the rules are supported by the need to prevent and remediate releases of petroleum or hazardous substances from USTs and are in the interest of both the general public and the regulated community.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

There are no exemptions provided under the federal rule, with which these rule must comply. With respect to alternative means of compliance, several of the rules contain provisions that permit an owner or operator to request alternative methods of compliance, which SFM-BUSTR can approve for good cause shown. These provisions are available to all persons, not just small businesses.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

There are no fines or penalties associated with an initial finding of violation; a UST owner or operator is always provided an opportunity to return to compliance before a fine or penalty is considered.

18. What resources are available to assist small businesses with compliance of the regulation?

SFM-BUSTR personnel, specifically including the assistant bureau chief, in-house legal counsel, and the full staff of UST inspectors and environmental specialists, are permanently available to answer questions about the rules and work with the regulated community to achieve and maintain compliance in as efficient and economic fashion as possible.