

Dated: October 2, 2001.

Diane C. Regas,

Acting Assistant Administrator for Water.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[FRL-7071-3]

Hawaii: Tentative Approval of State Underground Storage Tank Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of tentative determination on application of State of Hawaii for final approval, public hearing and public comment period.

SUMMARY: The State of Hawaii has applied for approval of its underground storage tank program for petroleum and hazardous substances under Subtitle I of the Resource Conservation and Recovery Act (RCRA). The Environmental Protection Agency (EPA) has reviewed the Hawaii application and has made the tentative decision that Hawaii's underground storage tank program for petroleum and hazardous substances satisfies all of the requirements necessary to qualify for approval. The Hawaii application for approval is available for public review and comment. A public hearing will be held to solicit comments on the application, unless insufficient public interest is expressed.

DATES: A public hearing is scheduled for November 13, 2001, unless insufficient public interest is expressed in holding a hearing. EPA reserves the right to cancel the public hearing if sufficient public interest is not communicated to EPA in writing by November 5, 2001. EPA will determine by November 9, 2001, whether there is sufficient interest to hold the public hearing. The State of Hawaii will participate in the public hearing held by EPA on this subject. Written comments on the Hawaii application, as well as requests to present oral testimony, must be received by the close of business on November 5, 2001.

ADDRESSES: Copies of the Hawaii application are available at the following addresses for inspection and copying:

U.S. EPA Region 9, Library, 13th Floor, 75 Hawthorne Street, San Francisco, California 94105, Phone: (415) 744-1510, 9 am through 4 pm,

Pacific Daylight Savings Time; U.S. EPA Region 9 Pacific Islands Contact Office (PICO), 300 Ala Moana Blvd., Room 5-152, Honolulu, HI 96850, Phone number: (808) 541-2721, 7 am through 3:30 pm, Hawaii Standard Time; Hawaii Department of Health (HDOH), Solid and Hazardous Waste Branch, 919 Ala Moana Boulevard, Room 212, Honolulu, Hawaii 96814, Phone: (808) 586-4226, 8 am through 4 pm, Hawaii Standard Time; HDOH, Environmental Management Division, 79-7595 Haukapila Street, Kealahou, HI 96750, Phone number: (808) 322-7011, 8 am through 4 pm, Hawaii Standard Time; HDOH, Environmental Health Facility, 1582 Kamehameha Avenue, Hilo, HI 96720, Phone number: (808) 933-0917, 8 am through 4 pm, Hawaii Standard Time; HDOH, Maui District Health Office, 54 High Street, Wailuku, HI 96793, Phone number: (808) 984-8230, 8 am through 4 pm, Hawaii Standard Time; HDOH, Kauai District Health Office, 3040 Umi Street, Lihue, HI 96766, Phone number: (808) 241-3323, 8 am through 4 pm, Hawaii Standard Time; or U.S. EPA Docket Clerk, Office of Underground Storage Tanks, c/o RCRA Information Center, 1235 Jefferson Davis Highway, Arlington, Virginia 22202, Phone: (703) 603-9231, 9 am through 5 pm, Eastern Daylight Savings Time.

Written comments should be sent to Ms. April Katsura of the Underground Storage Tank Program Office, U.S. EPA Region 9, Mail Code WST-8, 75 Hawthorne Street, San Francisco, California 94105.

Unless insufficient public interest is expressed, EPA will hold a public hearing on the State of Hawaii's application for program approval on November 13, 2001 at 6 p.m., Hawaii Standard Time, at the Kawanānākoa Middle School, 49 Funchal Street, Honolulu, Hawaii 96813, Phone: (808) 587-4430. Anyone who wishes to learn whether or not the public hearing on the State's application has been canceled should telephone one of the following contacts on or before November 9, 2001:

Ms. April Katsura of the Underground Storage Tank Program Office, U.S. EPA Region 9, Mail Code WST-8, 75 Hawthorne Street, San Francisco, California 94105, Phone: (415) 744-2024; or

Mr. Steven Y.K. Chang, P.E., Manager, Solid and Hazardous Waste Branch, Hawaii Department of Health, 919 Ala Moana Boulevard, Room 212, Honolulu, Hawaii, 96814, Phone: (808) 586-4226.

FOR FURTHER INFORMATION, CONTACT: Ms. April Katsura of the Underground Storage Tank Program Office, U.S. EPA

Region 9, Mail Code WST-8, 75 Hawthorne Street, San Francisco, California 94105, Phone: (415) 744-2024.

SUPPLEMENTARY INFORMATION:

I. Why Are State Programs Approved?

Section 9004 of RCRA, 42 U.S.C. 6991c, authorizes EPA to approve State underground storage tank programs to operate in the State in lieu of the Federal underground storage tank (UST) program, subject to the authority retained by EPA in accordance with RCRA. Program approval may be granted by EPA pursuant to RCRA section 9004(b), if the Agency finds that the State program: (1) Is "no less stringent" than the Federal program for the seven elements set forth at RCRA section 9004(a)(1) through (7); (2) includes the notification requirements of RCRA section 9004(a)(8); and (3) provides for adequate enforcement of compliance with UST standards of RCRA section 9004(a). Note that RCRA sections 9005 (on information-gathering) and 9006 (on federal enforcement) by their terms apply even in states with programs approved by EPA under RCRA section 9004. Thus, the Agency retains its authority under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the Agency will rely on federal sanctions, federal inspection authorities, and federal procedures rather than the state authorized analogues to these provisions.

II. What Has EPA Tentatively Decided With Respect to Hawaii's Application for Program Approval?

EPA has reviewed the Hawaii application, and has tentatively determined that the State's UST program for petroleum and hazardous substances meets all of the requirements necessary to qualify for final approval.

The State of Hawaii submitted its draft state program approval application to EPA by letter dated February 23, 2000. After reviewing the package, EPA submitted comments to the State for review. Hawaii submitted its complete state program approval application for EPA's tentative approval on May 23, 2001.

On January 12, 2000, Hawaii adopted UST program regulations for petroleum and hazardous substance underground storage tanks. These regulations became effective on January 28, 2000. Prior to the adoption of the regulations, Hawaii

solicited public comment and held a public hearing on the draft UST program regulations.

EPA will hold a public hearing on its tentative decision on November 13, 2001, unless insufficient public interest is expressed. The public may also submit written comments on EPA's tentative determination until November 5, 2001. Copies of the Hawaii application are available for inspection and copying at the locations indicated in the addresses section of this document.

EPA will consider all public comments on its tentative determination received at the hearing, or received in writing during the public comment period. Issues raised by those comments may be the basis for a decision to deny final approval to Hawaii. EPA expects to make a final decision on whether or not to approve Hawaii's program within 60 days of the public hearing, and will give notice of it in the **Federal Register**. The document will include a summary of the reasons for the final determination and a response to all major comments.

III. Where Are the State Rules Different From the Federal Rules?

States may enact laws more stringent than their federal counterparts. See RCRA section 9008, 42 U.S.C. 6991b. In addition, states may enact laws which are broader in scope than their federal counterparts; that is, the state laws have no counterpart in the federal UST program. This authority is specifically codified in 40 CFR 281.12(a)(3). State requirements that go beyond the scope of the Federal program are not part of the authorized program and EPA cannot enforce them. Although you must comply with these requirements in accordance with Hawaii law, they are not RCRA requirements. The statutory and regulatory provisions we have tentatively decided to authorize are found generally at Hawaii Revised Statutes ("HRS") sections 342L-1 through 342L-53 and Hawaii Administrative Rules ("HAR") 11-281-01 through 11-281-131. However, we consider the following State requirements, which pertain to the provisions involved in this tentative decision, to go beyond the scope of the Federal program. The following analysis of which requirements are broader in scope differs in some ways from the requirements which Hawaii identified as being broader in scope than the Federal program in its application.

1. Hawaii's definition of "owner," set forth at HRS section 342L-1, is broader in scope than the Federal definition of "owner" (see RCRA section 9001(3), 42 U.S.C. 6991(3), and 40 CFR 280.12) to

the extent that it includes persons who do not participate in the management of an UST or tank system who are otherwise not engaged in petroleum production, refining and marketing, but who hold indicia of ownership primarily to protect a security interest in the tank or tank system. More specifically, Hawaii's definition is broader in scope to the extent it requires such persons to comply with the technical standards and financial responsibility requirements since such persons are excluded from those requirements of the Federal UST program pursuant to 40 CFR 280.200 through 280.230.

2. Hawaii's UST program contains permitting requirements. This aspect of Hawaii's program is broader in scope than the Federal program since the Federal UST program does not include analogous permitting requirements. The following provisions pertain to Hawaii's permitting requirements: HRS section 342L-1 (definition of "permit"); HRS section 342L-4 (permits procedures); HRS section 342L-31 (permit requirements and transfer of permit); HAR 11-281-03 (definitions of "installation," "operate" and "permit"); HAR 11-281-23 (permit requirement); HAR 11-281-24(a) (application for a permit); HAR 11-281-24(b) (permit fee); HAR 11-281-24(c)(3) (information required in permit application); HAR 11-281-24(c)(4) (information required in permit application); HAR 11-281-25(a) (5 year permit to install and operate); HAR 11-281-25(b) (1 year to install UST); HAR 11-281-26 (permit renewals); HAR 11-281-27 (action on and timely approval of permit application); HAR 11-281-28 (permit conditions); HAR 11-281-29 (modification of permit and notice of change); HAR 11-281-30 (revocation or suspension of permit); HAR 11-281-31 (change in owner or operator for a permit); HAR 11-281-131 (Appendices II [Application for an UST Permit], IV [Application for Renewal of an UST Permit, June 1999], and V [Application for Transfer of an UST Permit, June 1999]); and the provisions at HRS section 342L-8(b) (enforcement orders may include suspension, modification or revocation of permit), HAR 11-281-34 (maintenance of permit or variance), 11-281-35 (fees), and HAR 11-281-45(c)(6) (maintenance of permit documentation), as they apply to permits.

3. Hawaii's definitions of "regulated substance" at HRS section 342L-1 and HAR 11-281-03 are broader in scope than the Federal definitions of "regulated substance" (see RCRA section 9001(2), 42 U.S.C. 6991(2), and

40 CFR 280.12). These definitions are broader in scope to the extent that Hawaii includes substances that are designated as regulated substances by the Hawaii Department of Health Services, pursuant to subsection (3) of Hawaii's definition of the term, which are neither (a) "any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste under subtitle C [of RCRA])" or (b) "[p]etroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute)." (See 40 CFR 280.12.)

4. Hawaii's UST program contains provisions which allow the State to grant variances. The Hawaii Attorney General's Office has indicated that such variances may be granted where State rules are broader in scope than the Federal regulations. To the extent that such variances are granted, and the resulting requirements imposed pursuant to such variances are broader in scope than the Federal UST requirements, the requirements imposed by such variances will not be federally enforceable as part of the authorized State program. However, to the extent that any variances are issued for aspects of the State's program which result in the imposition of requirements which are merely more stringent than the Federal UST requirements, as opposed to broader in scope, the resulting requirements of such variances will be federally enforceable as part of the authorized State program. The following provisions pertain to Hawaii's variance requirements: HRS section 342L-1 (definition of "variance"); HRS section 342L-5 (variance allowed); HRS section 342L-6 (procedures for variances); HAR 11-281-03 (definition of "variance"); HAR 11-281-32 (variance allowed); HAR 11-281-33 (variance applications); 11-281-131 (Appendix VI [Application for UST Variance, June 1999]); and the provisions at HRS section 342L-8(b) (enforcement order may include suspension, modification or revocation of variance), HAR 11-281-34 (maintenance of variance), 11-281-35 (fees), and HAR 11-281-45(c)(6) (maintenance of variance documentation), as they apply to variances.

5. HRS section 342L-14, which authorizes the Director of the Department of Health to establish certain fees, is broader in scope than the Federal UST program, which does not include an analogous provision.

6. HRS sections 342L–50 through 342L–53, which relate to Hawaii's response program for petroleum releases, are broader in scope than the Federal UST program to the extent that Hawaii includes in the definition of "operator" applicable to these provisions those persons who do not participate in the management of an UST or tank system who are otherwise not engaged in petroleum production, refining and marketing, but who hold indicia of ownership primarily to protect a security interest in the tank or tank system. Such persons are excluded from the Federal definition of "operator," for the purposes of the Federal response program for petroleum releases, pursuant to RCRA section 9003(h)(9), 42 U.S.C. 6991b(h)(9).

7. EPA and the State of Hawaii each exclude from their definitions of the term "underground storage tank" or "UST," farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes. See 40 CFR 280.12 and HAR 11–281–03, respectively. However, Hawaii's definitions of "farm tank" and "underground storage tank" or "UST" each indicate that a farm tank must be used only for farm related purposes. Hence, Hawaii's program is broader in scope than the Federal program to the extent that Hawaii regulates 1,100 gallon capacity or less USTs storing motor fuel on farms when such USTs are not used for either farm or commercial purposes.

8. Hawaii's definition of the term "reportable quantity" at HAR 11–281–03 and the requirements relating to reporting and clean up of spills and overfills of hazardous substances at HAR 11–281–64 are broader in scope than the Federal requirement relating to reporting and clean up of spills or overfills of hazardous substances under 40 CFR 280.53. The Hawaii threshold "reportable quantity" for trichloropropane is 10 lbs. Since the Federal program does not require reporting of releases of trichloropropane, the State's program is broader than the Federal program to this limited extent.

9. Hawaii's requirement for posting of signs, which is found at HAR 11–281–73, requires owners and operators to post signs around the perimeter of a site where contamination poses an immediate health risk or where contaminated media is exposed to the surface, if the Department of Health determines that the posting of such signs is appropriate. This requirement is broader in scope than the Federal UST program, which does not include an analogous provision.

In addition, EPA is not proposing to authorize HRS section 342L–16, which pertains to the "nonliability of department personnel," or HRS section 342L–23, which requires the Director of the Department of Health to establish a directory of UST service providers. These provisions are not a required part of a federally authorized UST program nor are they considered enforcement-related or procedural requirements. Furthermore, these provisions do not impose obligations on UST owners or operators.

IV. Administrative Requirements Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for

State, local or tribal governments or the private sector. The UMRA generally excludes from the definition of "Federal intergovernmental mandate" duties that arise from participation in a voluntary Federal program. Hawaii's participation in EPA's state program approval process under RCRA Subtitle I is voluntary. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

In addition, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Although small governments may own and/or operate underground storage tanks, they are already subject to the regulatory requirements under the existing State requirements that EPA is now tentatively approving and, thus, are not subject to any additional significant or unique requirements by virtue of this action. Thus, the requirements of section 203 of the UMRA also do not apply to today's rule.

Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of today's action on small entities, "small entity" is defined as: (1) A small business as specified in the Small Business Administration regulations; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action does not impose any new requirements on small entities because small entities that own and/or operate underground storage tanks in Hawaii are already subject to Hawaii's underground storage tank requirements which EPA is now tentatively approving. This action

merely tentatively approves, for the purpose of RCRA section 9004, those existing State requirements.

Compliance With Executive Order 12866 (Regulatory Planning and Review)

The Office of Management and Budget has exempted this rule from the requirements of Executive Order 12866.

Compliance With Executive Order 13045 (Children's Health)

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," applies to any rule that: (1) The Office of Management and Budget determines is "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it approves a state program.

Compliance With Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes."

This proposed rule does not have tribal implications. As an initial matter, there are no federally-recognized Indian tribes within the State of Hawaii. The authorization of Hawaii's UST program will not have substantial direct effects on tribal governments, on the

relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Even if Indian Country existed within the State, Hawaii would not be approved to implement the RCRA underground storage tank program in Indian country and this action would have no effect on the underground storage tank program that EPA would implement in Indian country within the State. Thus, Executive Order 13175 does not apply to this proposed rule.

Compliance With Executive Order 13132 (Federalism)

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation. This action does not have federalism implications. It will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it affects only one State. This action simply provides EPA approval of Hawaii's voluntary proposal for its State underground storage tank program to operate in lieu of the Federal underground storage tank program in that State. Thus, the requirements of

section 6 of the Executive Order do not apply.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, Federal agencies must consider the paperwork burden imposed by any information request contained in a proposed rule or a final rule. This rule will not impose any information requirements upon the regulated community.

Executive Order 13211 (Energy Effects)

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

List of Subjects in 40 CFR Part 281

Environmental protection, Administrative practice and procedure, Hazardous materials, State program approval, Underground storage tanks.

Authority: This action is issued under the authority of Section 9004 of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: September 21, 2001.

Laura Yoshii,

Acting Regional Administrator, Region IX.

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