

Grant Guidelines To States
For Implementing The
Delivery Prohibition Provision
Of The Energy Policy Act Of 2005

U.S. Environmental Protection Agency
Office of Underground Storage Tanks
Washington, DC
www.epa.gov/oust
EPA-510-R-06-003

August 2006

Contents

Overview Of The Delivery Prohibition Grant Guidelines	1
Why Is EPA Issuing These Guidelines?	1
What Is In These Guidelines?.....	1
When Do These Guidelines Take Effect?.....	1
Requirements For Delivery Prohibition	2
What Is Delivery Prohibition?.....	2
What Underground Storage Tanks Do These Guidelines Apply To?.....	2
What Definitions Are Used In These Guidelines?.....	2
Who Is Responsible For Complying With Delivery Prohibition Requirements?	3
Do These Guidelines Apply To Underground Storage Tanks Or To Underground Storage Tank Facilities?	3
How Does A State Implement These Guidelines?.....	3
What Are The Criteria For Determining Which Underground Storage Tanks Are Ineligible For Delivery, Deposit, Or Acceptance?	4
What Mechanisms May Be Used For Identifying Ineligible Underground Storage Tanks?	5
What Must A State Do To Reclassify Ineligible Underground Storage Tanks As Eligible?	6
What Are The Allowable Processes For Providing Adequate Notice To Underground Storage Tank Owners/Operators And Product Deliverers?	6
How May States Apply Delivery Prohibition In Rural And Remote Areas?	7
What Do States Need To Report To EPA?.....	7
What Enforcement Authority Must States Have For Delivery Prohibition?	7
How Will States Demonstrate Compliance With These Guidelines?	7
How Will EPA Enforce States' Compliance With The Requirements In These Guidelines?.....	8
For More Information About The Delivery Prohibition Grant Guidelines.....	9
Background About The Energy Policy Act Of 2005	9

Overview Of The Delivery Prohibition Grant Guidelines

Why Is EPA Issuing These Guidelines?

U.S. Environmental Protection Agency (EPA), in consultation with states, underground storage tank (UST) owners, and the product delivery industry, developed these grant guidelines to implement the delivery prohibition provision in Section 9012 of the Solid Waste Disposal Act (SWDA), enacted by the Underground Storage Tank Compliance Act, part of the Energy Policy Act of 2005 signed by President Bush on August 8, 2005.

Subsection (a) of Section 1527 of the Energy Policy Act amends Subtitle I of the Solid Waste Disposal Act by adding Section 9012, which includes a delivery prohibition requirement for states receiving federal funds under Subtitle I. Section 9012 requires EPA to develop and publish guidelines that describe the processes and procedures for the delivery prohibition provision by August 8, 2006. The guidelines must address the following five processes and procedures a state receiving Subtitle I funding (hereafter referred to as “state”) must follow to implement delivery prohibition:

- The criteria for determining ineligible underground storage tanks;
- The mechanisms for identifying ineligible underground storage tanks;
- The process for reclassifying ineligible underground storage tanks as eligible;
- The process(es) for providing adequate notice to underground storage tank owners/operators and product deliverers; and,
- The process for determining the specified geographic areas subject to the rural and remote areas consideration.

EPA’s Office of Underground Storage Tanks (OUST) is issuing these grant guidelines to establish the minimum requirements states receiving Subtitle I funding must meet in order to comply with the delivery prohibition provision of the Energy Policy Act of 2005.

What Is In These Guidelines?

These guidelines describe the minimum requirements a state’s delivery prohibition program must contain in order for a state to comply with statutory requirements for Subtitle I funding. These guidelines include definitions, criteria, examples, options, and requirements for states implementing the delivery prohibition provision.

When Do These Guidelines Take Effect?

A state receiving Subtitle I funding must implement the delivery prohibition requirements described in these guidelines by August 8, 2007.

Requirements For Delivery Prohibition

What Is Delivery Prohibition?

Delivery prohibition is prohibiting the delivery, deposit, or acceptance of product to an underground storage tank that has been determined to be ineligible by EPA or a state implementing agency¹ for such delivery, deposit, or acceptance.

What Underground Storage Tanks Do These Guidelines Apply To?

For purposes of this document, the term “underground storage tank” means those tanks that satisfy the definition of underground storage tank in 40 CFR 280.12, except for those tanks identified in 40 CFR 280.10(b) and 280.10(c) as excluded or deferred storage tanks. At a minimum, a state must apply these guidelines to petroleum underground storage tanks. EPA recognizes that many states have the authority to regulate underground storage tanks containing hazardous substances. States may choose to apply delivery prohibition to hazardous substance underground storage tanks in addition to petroleum underground storage tanks.

What Definitions Are Used In These Guidelines?

Many terms used in these guidelines are defined in 40 CFR 280.12. Unless otherwise noted, the definitions in 40 CFR 280.12 also apply to the terms in these guidelines. For purposes of these guidelines, terms not defined in 40 CFR 280.12 are defined as follows:

Green Tag: A document, device, tag, or other item identifying an underground storage tank or underground storage tank facility as eligible to receive product. Such item is generally affixed to the fill pipe or otherwise conspicuously displayed at the underground storage tank facility.

Product Deliverer: Any person² who delivers or deposits product into an underground storage tank. This term may include major oil companies, jobbers, petroleum transportation companies, or other product delivery entities.

Red Tag: A tag, device, or mechanism on the tank’s fill pipes that clearly identifies an underground storage tank as ineligible for product delivery. The tag or device is easily visible to the product deliverer and clearly states and conveys that it is unlawful to deliver to, deposit into, or accept product into the ineligible underground storage tank. The tag, device, or mechanism is generally tamper resistant.

¹ The term “state” does not exclude local government implementing agencies.

² “Person” has the same definition used in 40 CFR 280.12, which includes an individual, trust, firm, joint stock company, consortium, joint venture, commercial entity, United States Government, federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body.

Who Is Responsible For Complying With Delivery Prohibition Requirements?

Underground storage tank owners/operators and product deliverers are responsible for not delivering, depositing, or accepting product to an underground storage tank identified by EPA or a state as ineligible to receive product.

Do These Guidelines Apply To Underground Storage Tanks Or To Underground Storage Tank Facilities?

States may choose to prohibit delivery, deposit, or acceptance of product to an individual underground storage tank or to every underground storage tank at a facility.

How Does A State Implement These Guidelines?

A state implements these guidelines by:

- Having the authority to prohibit delivery, deposit, or acceptance of product to an underground storage tank for both equipment and operational violations; and
- Developing processes and procedures for a delivery prohibition program that, at a minimum, meet the requirements in these guidelines.

The state's delivery prohibition program must meet these guidelines by August 8, 2007. The sections that follow discuss the five categories³ of processes and procedures required by the Energy Policy Act of 2005. States may choose to be more stringent than these minimum requirements.

The state must clearly communicate to underground storage tank owners and operators and product deliverers the state's:

- Criteria for determining which underground storage tanks are ineligible for delivery, deposit, or acceptance of product;
- Mechanism(s) for identifying ineligible underground storage tanks;
- Process for reclassifying ineligible underground storage tanks as eligible for delivery, deposit, or acceptance of product;
- Process(es) for providing adequate notice to underground storage tank owners and operators and product deliverers that an underground storage tank has been determined to be ineligible for delivery, deposit, or acceptance of product; and
- Delineation of a process for the application of delivery prohibition in rural and remote areas. EPA recognizes that states with existing delivery prohibition programs may already have communicated these requirements to tank owners and operators and product deliverers.

States that have already communicated their requirements to tank owners and operators and product deliverers are not required to communicate their requirements

³ Delineated in sections 9012(a)(2)(A)-(E) of the Solid Waste Disposal Act.

any further. However, states must adequately communicate any changes to their existing delivery prohibition program.

What Are The Criteria For Determining Which Underground Storage Tanks Are Ineligible For Delivery, Deposit, Or Acceptance?

The state must develop criteria and timeframes for prohibiting the delivery, deposit, and acceptance of product, in accordance with the provisions below.⁴ A state may authorize the delivery or deposit of product to an ineligible underground storage tank if such activity is necessary to test or calibrate the underground storage tank or dispenser system.

A state must classify an underground storage tank as ineligible for delivery, deposit, or acceptance of product as soon as practicable after the state determines an underground storage tank meets one or more of the following conditions:

- Required spill prevention equipment is not installed;
- Required overfill protection equipment is not installed;
- Required leak detection equipment is not installed;
- Required corrosion protection equipment is not installed;⁵ or
- Other conditions a state deems appropriate.

The time allowed for a state to identify an underground storage tank as ineligible for delivery, deposit, or acceptance of product for one or more of the above conditions is intended to accommodate various state delivery prohibition procedures, not to provide additional time for underground storage tank owners or operators to return to compliance. Some states have the authority to prohibit delivery at the time of an inspection.

A state retains the discretion to decide whether to identify an underground storage tank as ineligible to deliver, deposit, or accept product based on whether the prohibition is in the best interest of the public. In some cases, prohibition of delivery, deposit, or acceptance of product to an underground storage tank is not in the best interest of the public, even in the cases of significant and/or sustained noncompliance (e.g., certain emergency generator underground storage tanks). In other cases, states may choose to classify an underground storage tank as ineligible to receive product but then authorize delivery in emergency situations.⁶

⁴ For certain severe situations at an underground storage tank facility, such as the presence of an on-going release, a state should generally consider using other authorities granted to the state under applicable health and safety or fire codes to immediately mitigate the risk instead of, or in addition to, a state's delivery prohibition authority.

⁵ A state is not required to but should generally prohibit the delivery, deposit, or acceptance of product for the failure to have corrosion protection equipment on a buried metal flexible connector.

⁶ For example, California provides authority to local implementing agencies to remove red tags from emergency generator tanks that provide power supply in the event of a commercial power failure, store petroleum, and are used solely in connection with an emergency system, legally required standby system, or optional standby system, as defined in Articles 700, 701, and 702 of the National Electric Code of the National Fire Protection Association.

A state should also classify an underground storage tank as ineligible for delivery, deposit, or acceptance of product if the owner/operator of that tank has been issued a written warning or citation (notice of violation or other form indicating a violation) under any of the following circumstances and the owner/operator has failed to take corrective action after a reasonable time frame that is determined by the state:

- Failure to properly operate and/or maintain leak detection equipment;
- Failure to properly operate and/or maintain spill, overfill, or corrosion protection equipment;
- Failure to maintain financial responsibility;
- Failure to protect a buried metal flexible connector from corrosion; or
- Other conditions a state deems appropriate.

What Mechanisms May Be Used For Identifying Ineligible Underground Storage Tanks?

Tank owners and operators and product deliverers are responsible for ensuring that product is not delivered, deposited, or accepted into an underground storage tank identified as ineligible to receive product. Therefore, a state must use a clear, concise mechanism or mechanisms for identifying ineligible underground storage tanks. The mechanism(s) a state uses must adequately indicate to product deliverers and underground storage tank owners/operators that an underground storage tank is ineligible to receive product. For a state developing a mechanism or mechanisms to use to identify ineligible underground storage tanks, the state should consult with underground storage tank owners/operators and product delivery industries. A state should also consider the ease of reclassifying an underground storage tank as eligible when choosing the method(s) for identifying ineligible underground storage tanks.

Some examples of mechanisms for identifying ineligible underground storage tanks include:

- Red tags attached to each fill pipe of the ineligible underground storage tank clearly identifying the tank as ineligible for delivery, deposit, or acceptance of product;
- Green tags attached to each fill pipe of the eligible underground storage tank clearly identifying the tank as eligible for delivery, deposit, or acceptance of product; or,
- A certificate conspicuously displayed at the facility clearly identifying the underground storage tank(s) at the facility as eligible for delivery, deposit, or acceptance of product.

What Must A State Do To Reclassify Ineligible Underground Storage Tanks As Eligible?

A state must reclassify an ineligible underground storage tank as eligible to receive product as soon as practicable once the state determines that the underground storage tank has been returned to compliance.

The state, after notification by the owner/operator that the violation(s) has/have been corrected, must do the following as soon as practicable:

- Confirm compliance. If any deficiencies that led to the delivery prohibition remain, the state must notify the owner/operator.
- Return the underground storage tank to being eligible to receive product⁷ if the violation(s) has/have been corrected and confirmed by the state.

States that have used delivery prohibition programs in the past have been responsive to the fact that when an underground storage tank has been classified as ineligible to receive product, it must be reclassified as eligible to receive product as soon as practicable once the owner/operator has corrected the violation(s). For example, many states ensure that underground storage tanks can be reclassified within five (5) business days and often reclassify within 24 hours of being notified of the correction(s).

What Are The Allowable Processes For Providing Adequate Notice To Underground Storage Tank Owners/Operators And Product Deliverers?

When an underground storage tank is determined to be ineligible for delivery, deposit, or acceptance of product, the state must make a reasonable effort to notify tank owners and/or operators in writing (e.g., field notification, mail, e-mail, or fax) prior to prohibiting the delivery, deposit, or acceptance of product. If an owner or operator is not present at the facility at the time the underground storage tank is identified as ineligible, an employee⁸ at the facility at the time of identification (in lieu of the owner or operator) may be notified in writing prior to prohibiting delivery.

In addition, a state must develop processes and procedures for notifying product deliverers when an underground storage tank is ineligible for delivery, deposit, or acceptance of product. The mechanism a state chooses for identifying eligible/ineligible underground storage tanks (e.g., green tags, red tags) may provide adequate notice to product deliverers.

⁷ After a state implementing agency confirms compliance, the state may authorize another party to reclassify an underground storage tank as eligible for delivery, deposit, or acceptance of product. For example, upon confirming compliance the state may provide written authorization to an owner or operator to remove the red tag from the underground storage tank.

⁸ A state should generally make every effort to provide the notification to the employee in charge of the facility at the time an underground storage tank is identified as ineligible for delivery, deposit, or acceptance of product.

How May States Apply Delivery Prohibition In Rural And Remote Areas?

A state may consider not treating an underground storage tank as ineligible for delivery, deposit, or acceptance of product if such treatment would jeopardize the availability of, or access to, motor fuel in any rural and remote areas. However, a state may only defer application of delivery prohibition for up to 180 days after determining an underground storage tank is ineligible for delivery, deposit, or acceptance of product. This limitation only applies in situations requiring prohibition of delivery, deposit, or acceptance of product, as described in the section entitled, "What Are The Criteria For Determining Which Underground Storage Tanks Are Ineligible For Delivery, Deposit, Or Acceptance?".

What Do States Need To Report To EPA?

Each state that receives Subtitle I funding must report to EPA as part of its quarterly or semi-annual performance report the number of underground storage tanks (or underground storage tank facilities) identified as ineligible for delivery, deposit, or acceptance of product during the reporting period.

What Enforcement Authority Must States Have For Delivery Prohibition?

States must, at a minimum, have the authority to impose civil penalties against any person who delivers, deposits, or accepts product at an underground storage tank identified as being ineligible for such delivery, deposit, or acceptance.

How Will States Demonstrate Compliance With These Guidelines?

After August 8, 2007, the effective date of the delivery prohibition requirements, and before receiving future grant funding, states must provide one of the following to the appropriate EPA Regional office:

- For a state that has met the requirements for delivery prohibition, the state must submit a certification indicating that the state meets the requirements in the guidelines.
- For a state that has not yet met the requirements for delivery prohibition, the state must provide a document that describes the state's efforts to meet the requirements. This document must include:
 - A description of the state's activities to date to meet the requirements in the guidelines;
 - A description of the state's planned activities to meet the requirements; and
 - The date by which the state expects to meet the requirements.

How Will EPA Enforce States' Compliance With The Requirements In These Guidelines?

As a matter of law, each state that receives funding under Subtitle I, which would include a Leaking Underground Storage Tank (LUST) Cooperative Agreement, must comply with the underground storage tank requirements of the Energy Policy Act. EPA anticipates State and Tribal Assistance Grants (STAG) funds will be available under the 2007 Appropriations Act for certain purposes authorized by the Energy Policy Act, and EPA will condition STAG grants with compliance with these guidelines. Absent a compelling reason to the contrary, EPA expects to address noncompliance with these STAG grant conditions by utilizing EPA's grant enforcement authorities under 40 CFR Part 31.43, as necessary and appropriate.

For More Information About The Delivery Prohibition Grant Guidelines

Visit the EPA Office of Underground Storage Tanks web site at www.epa.gov/oust or call 703-603-9900.

Background About The Energy Policy Act Of 2005

On August 8, 2005, President Bush signed the Energy Policy Act of 2005. Title XV, Subtitle B of this act (entitled the Underground Storage Tank Compliance Act) contains amendments to Subtitle I of the Solid Waste Disposal Act – the original legislation that created the underground storage tank (UST) program. This new law significantly affects federal and state underground storage tank programs, will require major changes to the programs, and is aimed at reducing underground storage tank releases to our environment.

The underground storage tank provisions of the Energy Policy Act focus on preventing releases. Among other things, the Act expands eligible uses of the Leaking Underground Storage Tank (LUST) Trust Fund and includes provisions regarding inspections, operator training, delivery prohibition, secondary containment and financial responsibility, and cleanup of releases that contain oxygenated fuel additives.

Some of these provisions require implementation by August 2006; others will require implementation in subsequent years. To implement the new law, EPA and states will work closely with tribes, other federal agencies, tank owners and operators, and other stakeholders to bring about the mandated changes affecting underground storage tank facilities.

To see the full text of this new legislation and for more information about EPA's work to implement the underground storage tank provisions of the law, see: http://www.epa.gov/oust/fedlaws/nrg05_01.htm