PROPOSED ORDER OF THE DEPARTMENT OF COMMERCE

CREATING RULES

The Wisconsin Department of Commerce proposes an order to repeal Comm 10.515 (5) (b) and (c) and 10.615 (5) (a) 4.;

to renumber Comm 10.050 (52); 10.515 (5) (d); and 10.615 (5) (a) 1., 2., and 6., and (6) (b) and (c);

to renumber and amend Comm 10.615 (5) (a) 3. and 5.;

to amend Comm 2.43 (title) and (1); 10.100 (1) (b) 6.; 10.130 (3) (b) 3. Note; Table 10.200-9; 10.330 (4) (c); 10.340 (5); 10.350 (2) (a) to (c); 10.400 (2) (b) (title) and (intro.) to 3., and (3) (g) 2. and 3.; 10.410 (6) (c) and (9); 10.420 (5); Comm 10.500 (1) (b) 3. and 4., (5) (f) 2. and 3., and (6) (b) 2. a.; 10.503 (1) and (2) (intro.) and (c); 10.505 (2) (a) 2.; 10.510 (2) (title); 10.515 (2) (b) 3. b.; 10.520 (1) (b) 1.; 10.545 (2) (c), (3) (title), and (3); and 10.615 (1);

and to create Comm 10.050 (52), 10.225, 10.500 (9) Note, 10.503 Notes, 10.520 (2) (b) 4., 10.530 (1) (c), 10.535 (9), and 10.605 (1) (f) (title) and (g) (title) relating to flammable, combustible and hazardous liquids, and affecting small businesses.

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Rule Summary

1. Statutes Interpreted

Sections 101.02 (15), 101.09 (3), 101.11 (2), 101.14 (1) (a), 101.19, and 168.16 of the Statutes.

2. Statutory Authority

Sections 101.02 (15), 101.09 (3), 101.11, 101.14 (1) (a), 101.19, 168.16 (4), and 227.11 (2) (a) of the Statutes.

3. Explanation of Agency Authority

Under the statutes listed above, the Department has a responsibility to adopt and administer rules for safe storage, handling and use of flammable, combustible and hazardous liquids. The rules in this order encompass fire safety, life safety and environmental safety aspects for flammable, combustible and hazardous liquids. The Department also has authority under section 227.11 (2) (a) of the Statutes to promulgate rules interpreting any statute that is enforced or administered by the Department, if the rule is considered necessary to effectuate the purpose of the statute.

4. Related Statute or Rule

The rules in this order are related to rules in chapter Comm 14, which addresses fire prevention; chapter Comm 47, which addresses Petroleum Environmental Cleanup Fund Awards; and chapter Comm 48, which addresses grade specifications and inspection criteria for petroleum products.

5. Plain Language Analysis

The rules in this order are primarily intended to implement the operator-training criteria issued by the United States Environmental Protection Agency (EPA) in response to the federal Energy Policy Act of 2005. These criteria apply to all underground storage tank systems (USTs) that are federally regulated under Part 280 of Title 40 of the *Code of Federal Regulations*. These tank systems coincide with the underground storage tank systems that are required by section Comm 10.145 to have a permit to operate from the Department.

The proposed rules also include several miscellaneous changes in chapters Comm 2 and 10 that are needed primarily for clarification purposes as a follow-up to repealing and recreating chapter Comm 10 in 2008. These changes include (1) adopting an updated version of a standard for repair of shop-fabricated aboveground tanks; (2) clarifying that overfill-protection requirements apply to existing (not just new) aboveground storage tanks having both a fill point outside a diked area and either a tight-connect delivery or latch-open filling; (3) extending secondary-containment requirements to apply to new safe-suction systems and new tank-manifold piping, to be consistent with overriding EPA regulations; (4) clarifying that inventory-verification requirements apply only to retail tank systems, and that they apply there regardless of the capability of an automatic tank gauge; (5) extending underground storage tank tightness testing to tanks that are inspected internally because of having a failing sacrificial anode system, tanks that have periodic internal inspections because of being previously lined, and tanks that have a lining which is being repaired; (6) requiring installation of an access way from the tank interior to finished grade (if not already provided) when lining a tank or inspecting a lined tank, so that an inspector can readily enter the tank during subsequent inspections; and (7) making underground storage tank systems comply with the aboveground storage tank system requirements for double-poppet emergency shut-off valves at dispensers, and for monthly monitoring of the water level in the tank.

In addition to clarifying the application of inventory-verification requirements to retail facilities, the Department invites recommendations on whether to apply these or similar inventory-verification requirements to non-retail facilities that have underground tanks or underground pressurized piping, such as bulk plants and fleet operations.

6. Summary of, and Comparison With, Existing or Proposed Federal Regulations

The operator-training requirements in Section 9010(a) of the federal Solid Waste Disposal Act that was enacted as part of the 2005 Energy Policy Act, and the EPA criteria issued in conjunction with Section 9010(a), establish three classes of operators for federally regulated underground storage tank systems – i.e., Class A operators have primary responsibility for on-site operation and maintenance of the systems, Class B operators have daily on-site responsibility for the operation and maintenance of the systems, and Class C operators have daily on-site

responsibility for addressing emergencies presented by spills or releases from the systems. The EPA criteria, as published in EPA-510-R-07-005, further specify (1) which facilities are subject to the training criteria, (2) who is subject to the training criteria, (3) minimum components of the training programs for each class of operator, (4) a 3-year timeframe for completing the training of all the operators, (5) establishment of a state-level system for ensuring all operators are trained in accordance with the criteria, (6) methods for states to demonstrate compliance with the criteria, and (7) methods the EPA will use to enforce state-level compliance with the criteria.

The operator-training rules in this proposed order consist of no more than – and no less than – the EPA criteria, with the following exceptions:

A. Wherever the EPA criteria refer to a "release," other than for reporting, the text is clarified to also refer to leaks. This clarification is consistent with the text in chapter Comm 10 that recognizes and distinguishes between these two circumstances. Consequently, for example, the proposed rules would (1) require a Class B operator to receive training in operation and maintenance requirements that address leak detection – not just release detection, and (2) require a Class C operator to be trained to take action in response to an alarm caused by a leak – not just an alarm caused by a release. The EPA references to reporting of releases are not expanded to include reporting of leaks, except where a Class C operator reports to a Class B operator, because chapter Comm 10 does not require reporting leaks. However, the references to reporting of releases are clarified to include both suspected and obvious releases, to be consistent with the text in chapter Comm 10 that recognizes and distinguish between these two types of releases.

B. For a facility at which the owner and operator are separate persons, additional text makes them equally responsible for ensuring that the Class A, Class B and Class C operators are designated.

C. The responsibilities for the Class B operator, in section Comm 10.830 (2) (e), are expanded to include providing the Class C operator with specified, written instructions for fulfilling the Class C responsibilities; and those Class C responsibilities are described in greater detail in the specified instructions than in the EPA criteria. Similarly, additional text in section Comm 10.830 (2) (f) clarifies that the Class B operator is responsible for ensuring that the Class C operator is present during all operating hours of typical tank systems for fueling facilities; and the circumstances where that presence is not required are specified. Further, section Comm 10.842 (2) clarifies that the Class C operator must be trained to understand the required written instructions.

D. In the prescribed acceptable training, in section Comm 10.850 (2) (b), additional text clarifies that the training for a Class C operator must be provided by, or authorized by, an accredited Class A or Class B operator *for the facility where the Class C operator is employed*. Consequently, a Class C operator could move from one facility to another that is operated by the same Class A or Class B operator – but would need new training and accreditation to be a Class C operator at another facility that is operated by a different Class A or Class B operator.

E. In the retraining requirements, in section Comm 10.880, a definition is included for "significant compliance," which applies beyond EPA's referenced guidance for release prevention and release detection. This definition is intended to foster consistency in enforcement, and is essentially copied from the definition of "substantial compliance" in the Wisconsin Fire Protection

Code, chapter Comm 14, where it has been helpful for the past several years in auditing local fire departments.

The proposed rules include selection of the following options that are allowed in the EPA criteria:

A. For the deadline for having a Class A, Class B and Class C operator, in section Comm 10.820, a phase-in schedule is established that (1) applies EPA's August 8, 2012, deadline only to small businesses; and (2) applies an earlier, January 1, 2012, deadline to all other facilities. This phase-in would be consistent with the requirements in section 227.22 (2) (e) of the Statutes for allowing small businesses extra time to comply with new rules that have a significant economic impact, and could be helpful not only to small businesses but also to the Department and its regulatory and training partners in implementing this portion of the training program.

B. In section Comm 10.841 (2) (a), an option is included for any Class B operator to have site-specific training that is focused only on equipment used at the operator's facility.

C. Section Comm 10.850 (2) (a) 1. specifies a Wisconsin-based International Code Council® training and certification process for Class A and Class B operators, as the base-level process. Discussions with ICC staff indicate several advantages of using this approach – particularly in combination with the equivalent, alternate training programs that are permitted for Class A and Class B operators in section Comm 10.850 (2) (a) 2. The ICC process could include evaluation and certification of individuals who skip the training because they already have adequate knowledge about operating underground storage tank systems.

D. Section Comm 10.850 (4) includes, for Class A and Class B operators, reciprocity acceptance of training verification from other states that have equivalent training programs.

E. The recordkeeping requirements in section Comm 10.870 include keeping documentation of compliance only at each facility or at another, readily available site – rather than reporting that compliance to the Department or authorized agent.

The proposed rules do not include an EPA-referenced option of requiring renewal of the training.

7. Comparison With Rules in Adjacent States

Michigan

Michigan is currently updating their 1998 rules for their UST program. They are working with stakeholders on the rules package and plan to have new rules promulgated within the next year. Included in the code update is the mandate for operator training, which will mostly mirror the EPA requirements. They are planning to require ICC certification and to require renewals every 2 years, and plan to limit the number of facilities that a Class B operator can oversee to 45. For facilities that are routinely attended, at least one Class C operator is expected to be present during all operating hours – and at unmanned facilities, fuel delivery personnel are expected to fulfill the Class C operator responsibilities, for the purpose of fuel deliveries. The draft rules include substantially greater detail than the EPA criteria, for the training that Class C operators must receive.

Minnesota

Minnesota has developed a UST rule-revision draft that includes operator-training requirements and has sent it to their Revisor's Office for review, after which it will be released for public comment for 30 days. They expect to meet the August 8, 2009, EPA deadline for having the revised rule in place.

Some key points that Minnesota has included in their revised rule are as follows:

1. Training for operators will not always be mandatory. The operator will have the choice of taking only a test. If the operator fails the test, training by a State-approved trainer will be mandatory.
2. Trainers must be approved by the State in order to provide operator training.
3. Only Class A and Class B operators must pass a test.
4. Class B operators must be employees of the company that owns the facility. Class B operators will also be tested on site-specific equipment and functions. (No third-party contractors are permitted.)
5. An outside party likely will create an on-line testing platform.
6. The operator training is expected to be phased in over a 3-year period, with sequential deadlines that are based on telephone area codes.
7. For facilities that are routinely attended, at least one Class C operator is expected to be present during all operating hours – and at unmanned facilities, a sign must be posted showing the emergency shut-off procedures and the name, address and telephone number of the owner, operator or local emergency response personnel.
8. If a facility is found to have a significant-operational-compliance violation at the time of a State inspection, the Class B operator will be required to take training and pass another test.

Minnesota has begun meeting with a group of stakeholders that includes a wide spectrum of tank owners, to help develop the test questions for the operators.

Further information about the rule revision is available at http://www.pca.state.mn.us/rulesregs/ust-rules.html, and the current rule draft is posted at http://www.pca.state.mn.us/publications/rule-ch7150-draft2-0908.pdf.

Iowa

Iowa has begun their rulemaking process for the operator-training requirements and has held internal meetings for developing draft rules. A stakeholder meeting was held in February to discuss options and get input.

Illinois

Illinois is in the preliminary stages of rulemaking, and has not yet developed draft rules. The State Fire Marshall's office has contacted Wisconsin to survey our experiences with stakeholder meetings and to obtain a copy of our proposed rules.

8. Summary of Factual Data and Analytical Methodologies

The information from which the proposed operator-training rules were developed consisted of (1) the EPA criteria published in EPA-510-R-07-005, (2) existing and proposed rules from

about 15 other states, and (3) personal contacts with staff from the International Code Council and with private-sector trainers for operators of underground storage tank systems.

The proposed miscellaneous changes to chapter Comm 10 were developed primarily from six regional training sessions the Department conducted statewide in January and February of 2009 in conjunction with implementing a comprehensive update of chapter Comm 10 that became effective on February 1, 2009.

The proposed rules were also developed with assistance from the Department's advisory committee for flammable, combustible and hazardous liquids. The members of that advisory committee are as follows:

Name	Representing
Randy Shervey	Wisconsin Fire Inspectors Association
Erin Roth	Wisconsin Petroleum Council
Tim Clay	Wisconsin Federation of Cooperatives
Tara Wetzel	Wisconsin Transportation Builders Association
Paul Knower	Wisconsin Petroleum Equipment Contractors Association
Scott Miller	Wisconsin Fire Chiefs Association
Steve Danner	Wisconsin Aviation Trades Association
Elizabeth Hellman	Wisconsin Utilities Association
Gary Pate	Wisconsin Insurance Alliance
John Reed	Wisconsin Airport Management Association
Dale Safer	Wisconsin Innkeepers
Bill Noel	Wisconsin Paper Council
Matt Hauser	Wisconsin Petroleum Marketers and Convenience Store Association

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of Economic Impact Report

The Department derived the cost estimates in the following section from input from the International Code Council and private-sector trainers for operators of underground storage tank systems.

10. Anticipated Costs Incurred by Private Sector

The base-level, International Code Council certification service has been adopted by California and Wyoming. The cost is about $150 per person – which covers the cost of the State and EPA reference material, and a test. The ICC service is a self-directed process where individuals purchase the State and federal regulations and pertinent publications, and then go to a test center to take the test. The cost for taking the ICC test, without the training, is $75.

If a private-sector group such as Petroleum Training Solutions (PTS) provides open-to-the-public training, like they currently provide in Oregon and other States, the charge should be about $325 per person. PTS is partnering with several petroleum-marketer associations in Oregon and other States to get reductions in cost, in exchange for marketing the classes within the respective

associations. In Oregon, the fee for members of the Oregon Petroleum Marketers Association is $280.

In Kansas, the State pays for the training, and the cost is about $5,000 per classroom. (PTS prefers to limit class sizes to 35, but in Kansas they accommodated rooms of 50.) These sessions would cost approximately $125 to $150 per person.

Williams & Company also provides classroom training in Kansas, with opportunities for direct questions and answers, and they bring in UST equipment for hands-on training. The company prefers to conduct a class of at least 50 persons – and does some classes back-to-back to minimize travel costs. These sessions would cost approximately $125 to $150 per person. The company provides an open-book group test, and certifies the participants at the conclusion of the class. Testing can be designed any way the State desires. The company maintains a spreadsheet of the individuals who are certified, along with the site identification, and provides the list to the State of Kansas to use to verify training, during annual renewals of UST permits.

Williams & Company also provides two types of webinars – the first is a video Web broadcast of a speaker in front of a local audience, and other participants can access the presentation over the Web. The second is a log-in to a Web site where participants have audio via a phone line and watch a PowerPoint presentation on the Web site. The second is much less costly. The first may require a TV studio and production facilities, and broadcast services can be rather expensive. Depending on the number of participants and the type of webinar, these costs could range from $50 to $225, based on production costs of $10,000. The biggest difference between in-class training and on-line webinars is that for webinars, the participants do not have travel time and associated expenses, so the savings are immediate.

In Colorado, PTS will start presenting webinars in May, that will cost $325. Under this webinar model, the webinars will be free, and the fee will be collected when the test is taken from PTS.

The State of New Mexico estimates that classroom training for their Class A and Class B operators may range from $200 to $350 per person.

Costs for training Class C operators are not expected to be significant because all Class C training will be provided by, or authorized by, the Class B operator for the facility.

11. Effect on Small Business

These rule changes may have an economic effect on any small business with at least one federally regulated underground storage tank containing a flammable, combustible or federally-regulated hazardous liquid. These economic effects are not expected to be significant, and are summarized in section 10 above.

12. Agency Contact Information

Sam Rockweiler, Wisconsin Department of Commerce, Division of Environmental and Regulatory Services, P.O. Box 14427, Madison, WI, 53708-0427; telephone (608) 266-0797; e-mail sam.rockweiler@wi.gov.

13. Place Where Comments Are to Be Submitted, and Deadline for Submission.

Comments on the proposed rules may be submitted by e-mail to srockweiler@commerce.state.wi.us, no later than April 2, 2009. If e-mail submittal is not possible, written comments may be mailed, by the same date, to Sam Rockweiler, Department of Commerce, Division of Environmental and Regulatory Services, P.O. Box 14427, Madison, WI 53708-0427.

File reference: Comm 10 - OpTn/rule analysis ph