

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

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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's Administrator to develop and publish grant guidelines that describe the processes and procedures for the delivery prohibition provision by August 8, 2006. The grant guidelines must address the following five processes and procedures a state must follow to implement delivery prohibition:

- The criteria for determining what violations will lead to delivery prohibition;
- The mechanisms for identifying ineligible facilities;
- The process for reclassifying ineligible facilities as eligible;
- The process(es) for providing adequate notice to underground storage tank owners/operators and suppliers; 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 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?

States 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 petroleum to an underground storage tank that has been determined to be ineligible by EPA or a state 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. These guidelines must, at a minimum, apply to petroleum underground storage tanks.

NOTE: These guidelines allow states to apply delivery prohibition only to petroleum underground storage tanks. We are interested in public comments on whether these guidelines should apply to hazardous substance underground storage tanks as well. We are also interested in any information you can provide on the frequency of deliveries to hazardous substance underground storage tanks, the states that currently use delivery prohibition on hazardous substance underground storage tanks, and any other information relevant to deliveries to hazardous substance underground storage tanks.

What Other Definitions Are Used In These Guidelines?

Many terms used in these guidelines are defined in 40 CFR 280.12, unless otherwise noted. 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 petroleum. Such item may be affixed to the fill pipe or otherwise displayed at the underground storage tank facility.

Product Deliverer: A person who delivers or deposits a regulated substance into an underground storage tank.

Red Tag: A tag, device, or mechanism that clearly identifies an underground storage tank as ineligible for product delivery on the tank's fill pipes. The tag or device must be easily and immediately visible to the product deliverer and must clearly state and convey to him/her that it is unlawful to deliver to, deposit into, or accept product into the ineligible underground storage tank. The tag or device must be tamper resistant.

Tamper Resistant: A tag or other device that cannot be removed and reattached without obvious visual evidence (for example, one-time-use zip tie with the state agency's name and logo on it).

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 petroleum to an underground storage tank identified by EPA or a state as ineligible to receive such 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 petroleum to an individual underground storage tank or to every underground storage tank at a facility.

NOTE: These guidelines allow states to apply delivery prohibition to either individual underground storage tanks or entire underground storage tank facilities. We are interested in public comments on whether these guidelines should apply to entire underground storage tank facilities or to the individual underground storage tanks.

How Does A State Implement These Guidelines?

A state implements these guidelines by 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, at a minimum, meet these guidelines beginning on August 8, 2007. The sections that follow discuss the five categories¹ 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, operators, and supplier industries the state's: 1) criteria for determining which underground storage tanks are ineligible for delivery, deposit, or acceptance of petroleum; 2) mechanism(s) for identifying ineligible underground storage tanks; 3) process for reclassifying ineligible underground storage tanks as eligible for delivery, deposit, or acceptance of petroleum; 4) processes for providing adequate notice to underground storage tank owners and operators and supplier industries that an underground storage tank has been determined to be ineligible for delivery, deposit, or acceptance of petroleum; and, 5) delineation of the application of delivery prohibition in rural and remote areas.

¹ Delineated in sections 9012(a)(2)(A)-(E) of the Solid Waste Disposal Act.

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

A state must have the authority to prohibit delivery, deposit, or acceptance of petroleum to an underground storage tank and develop criteria and timeframes for prohibiting such deliveries, deposits, and acceptances, in accordance with the provisions below.²

A state must classify an underground storage tank as ineligible³ for delivery/deposit/acceptance of petroleum within 14 days of determining an underground storage tank has one or more of the following conditions:

- Lack of required spill prevention equipment;
- Lack of required overfill protection equipment;
- Lack of required leak detection equipment;
- Lack of required corrosion protection equipment; or
- Other conditions a state deems appropriate.

A state should generally also consider classifying an underground storage tank as ineligible for delivery/deposit/acceptance of petroleum 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 timeframe 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 have corrosion protection equipment on a buried metal flexible connector; or
- Other conditions a state deems appropriate.

NOTE: This approach imposes mandatory delivery prohibition for the most severe violations (lack of equipment) but only requires a state to have the authority to prohibit delivery for other violations. An alternative approach is to simply require states to have the authority to prohibit deliveries for noncompliance but not actually require prohibition for the most severe cases. Please comment on whether or not this alternative approach is preferred and why.

² 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.

³ States retain the discretion to decide not to identify an underground storage tank as ineligible to deliver/deposit/accept petroleum when it is in the best interest of the general public, as delineated in the section entitled "What Discretion Do States Have In Making Ineligibility Determinations?".

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

Both tank owners/operators and product deliverers are responsible for ensuring that petroleum is not delivered, deposited, or accepted into an underground storage tank clearly identified as ineligible to receive such product. Therefore, a state shall use a clear, concise mechanism or mechanisms for identifying ineligible underground storage tanks. The mechanism(s) a state uses must adequately indicate to deliverers and owners/operators that an underground storage tank is ineligible to receive petroleum.

A state that, as of August 8, 2006, has the authority to prohibit delivery/deposit/acceptance of petroleum to noncompliant underground storage tanks but use a mechanism other than “red tags” to identify ineligible tanks may continue to use the alternative mechanism if the state certifies to EPA that the state’s program has the authority to prohibit delivery/deposit/acceptance of petroleum for lack of required equipment and/or failure to properly operate and maintain an underground storage tank. A state that, as of August 8, 2006, does not have the authority to prohibit delivery/deposit/acceptance of petroleum to noncompliant underground storage tanks must clearly identify ineligible underground storage tanks with a tamper-resistant “red tag” on each fill pipe of the ineligible tank that explicitly states that the delivery/deposit/acceptance of petroleum is prohibited to the identified underground storage tank.

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 petroleum 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 remain, the state must notify the owner/operator.
- Return the underground storage tank to eligibility if the violation(s) has/have been corrected and confirmed by the state. For purposes of these guidelines, “return to eligibility” means the physical removal of the tags prohibiting delivery by a regulator or by an individual granted the authority to remove a “red tag” by the state.⁴

⁴ If a state uses an alternative mechanism for notifying owners/operators and the delivery industry of an underground storage tank’s ineligibility for delivery/deposit/acceptance of petroleum as certified to EPA under the section “What Mechanisms May Be Used For Identifying Ineligible Underground Storage Tanks?,” the “return to eligibility” may mean providing the necessary green tag, certificate, etc.

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 petroleum, it must be reclassified as eligible to receive petroleum 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 corrections.

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

In providing notification to underground storage tank owners/operators when an underground storage tank is determined to be ineligible for delivery, deposit, or acceptance of petroleum, states must notify tank owners and/or operators in writing (field notification, mail, e-mail, or fax) prior to prohibiting the delivery of petroleum. If an owner and/or operator is/are not present at the facility at the time the underground storage tank is identified as ineligible, the responsible party at the facility at the time of identification (in lieu of the owner or operator) may be notified in writing prior to prohibiting delivery. A “red tag” that clearly identifies an ineligible underground storage tank on each fill pipe of the ineligible tank is sufficient notification to supplier industries. The tag must explicitly state that it is unlawful to deliver, deposit, or accept petroleum into the ineligible underground storage tank. Any person who delivers, deposits, or accepts petroleum into an underground storage tank that is ineligible for such delivery is not liable if s/he was not adequately notified [Section 9012(c)].

If a state certifies it has an existing non-“red tag” delivery prohibition program under the “What Mechanisms May Be Used For Identifying Ineligible Underground Storage Tanks?” section, then the state’s existing notification process to supplier industries is acceptable.

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 petroleum if such treatment would jeopardize the availability of, or access to, 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 fuel. This limitation only applies in situations requiring prohibition of delivery, deposit, or acceptance of fuel, as described in the section entitled, “What Are The Criteria For Determining Which Underground Storage Tanks Are Ineligible For Delivery, Deposit, Or Acceptance?”.

What Discretion Do States Have In Making Ineligibility Determinations?

A state retains the discretion to decide whether to identify an underground storage tank as ineligible to deliver/deposit/accept petroleum. In some cases, prohibition of delivery/deposit/acceptance of petroleum to an underground storage tank is not in the best interest of the public, even in the cases of significant and/or sustained noncompliance. If a state determines that it is in the public's best interest to keep a noncompliant underground storage tank eligible for delivery/deposit/acceptance, a state may utilize its discretion in determining the underground storage tank's eligibility and not identify the underground storage tank as ineligible for delivery/deposit/acceptance of petroleum. States may also choose to classify an underground storage tank as ineligible to receive petroleum but then authorize fuel delivery in emergency situations.⁵

What Do States Need To Report To EPA?

Each state that receives Subtitle I funding must report the following to EPA as part of its quarterly or semi-annual performance report:

- The number of facilities that have at least one underground storage tank identified as ineligible for delivery/deposit/acceptance of petroleum during the reporting period; and
- The average number of days it takes ineligible underground storage tanks to return to eligibility once prohibited from delivery/deposit/acceptance of petroleum during the reporting period.

What Enforcement Authority Must States Have For Delivery Prohibition?

At a minimum, states must have the same enforcement authorities for a person who delivers, deposits, or accepts petroleum at an underground storage tank identified as being ineligible for such delivery, deposit, or acceptance as they have for violations of current underground storage tanks requirements.

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 EPA:

- 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.

⁵ 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.

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- 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, it 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