



Title 10 – DEPARTMENT OF NATURAL RESOURCES
Division 26 –Petroleum and Hazardous Substance Storage Tanks
Chapter 2 – Underground Storage Tanks – Technical Regulations

PROPOSED RULE

10 CSR 26-2.080 Public Participation and Notice

PURPOSE: This rule establishes procedures for public participation intended to allow parties affected by a petroleum tank release to provide comments to the department regarding the contamination and planned corrective action activities.

(1) The department will provide for public notice and participation when a release from a petroleum tank system requires a corrective action plan under 10 CSR 26-2.079. The department shall provide, or allow owners and operators to provide, public notice by means designed to reach those members of the public directly affected by the release and the planned corrective action.

(2) Public notice shall be provided to those members of the public directly affected by the release and the planned corrective action in either of the following circumstances.

(A) When contamination from petroleum released from a regulated underground storage tank (UST) system in any media at concentrations exceeding the default target levels in Table 1 of 10 CSR 26-2.077 or, with the approval of the department, [other] the risk-based target levels applicable to residential land use in Tables 2, 5, and 6 of 10 CSR 26-2.077 has migrated or is likely to migrate beyond one or more boundaries of the property on which the contamination originated and onto one or more adjacent or nearby properties; or

(B) If the department determines that implementation of an approved corrective action plan has failed to achieve applicable target levels or otherwise successfully mitigate unacceptable risks associated with contamination, and the department has terminated or is considering terminating the corrective action plan.

(3) Those members of the public directly affected shall include owners and occupants of adjacent and nearby property onto which contamination has migrated or is likely to migrate regardless of the media through which migration has occurred. When contamination has migrated or is likely to migrate onto multiple properties or affects, or potentially affects, groundwater that is or is likely to be used for domestic or other uses that will or could result in human exposure to chemicals of concern in groundwater, particularly when such groundwater is used as a public water supply, the department may consider other members of the public as being directly affected and require broad public notice. In determining whether multiple properties have been or are likely to be affected and the need for broad public notice, the department will consider the number, size and ownership of the properties.

(4) Public notice may be made via one or more of the following means or other means determined appropriate by the department:

(A) Notice in newspapers having circulation in the area in which the site is located;

Comment [n1]: Two issues associated with this rule: 1) the rule was significantly rewritten to allow owners/operators to conduct public participation activities in lieu of the department; 2) the need for public participation is triggered when contaminant concentrations exceed a residential standard, regardless of actual current/future land use (pertains to "neighbor notice" issue).

Comment [n2]: Under 2.079, a corrective action plan is required if contaminants will remain above a residential standard, even if the current/future use of the property is non-residential (if the property is non-residential, the rules require long-term stewardship to preserve non-residential use); if a corrective action plan is required, then so is public participation.

Comment [n3]: Same as above

Comment [n4]: Based on comments received, the Department intends to revise the definition of "site" to mean the property on which a tank is or was found and on which contamination originated. This revised definition will necessitate the revision of other rule language for clarity and consistency.

- (B) Block advertisements;
- (C) Public service announcements;
- (D) Publication in the state register;
- (E) Letters to individual households;
- (F) Letters to property owners;
- (G) Personal contacts by field staff.

(5) Public notice shall be made at least forty-five (45) days prior to the planned implementation of the corrective action plan and shall occur prior to the department's approval of the proposed corrective action plan so that the department can receive and consider public comment when determining whether to approve the corrective action plan.

(6) Each public notice occurrence shall allow for a public comment period of at least thirty (30) days after notice has been made and shall specify how those who wish to comment may provide their comments to the department. The notice shall request that all comments be directed to the department.

(7) In each instance in which the department determines that public notice as per section (2) of this rule is required, before providing the public notice, the department will give owners and operators an opportunity to provide the required public notice in lieu of the department. If owners and operators decline, fail to meet notification deadlines as prescribed by the department, or provide notice the department believes to be inadequate, then the department will provide the public notice.

Comment [n5]: This public participation rule was significantly rewritten in order to allow owners and operators the option of conducting the public participation in lieu of the department; if the owner/operator is to conduct the activities, they must have guidelines to follow and requirements to meet, thus the rewritten rule. The original public participation rule did not allow owners/operators to conduct public participation in lieu of the department.

(8) The department may undertake, or allow owners and operators to undertake, public participation activities beyond simple notification of owners and occupants of adjacent and nearby properties if, as determined by the department, contamination is widespread, sufficient public interest exists regarding the corrective action plan or risk assessment, or if deemed necessary by the department for other reasons. The department may gauge public interest based on the response it receives from the initial public notice.

(9) Limited public notice. Where members of the public directly affected is limited to owners and occupants of adjacent and nearby property the following provisions shall apply.

(A) Where public notice is required in accordance with subsection (2)(A) of this rule, owners and occupants of adjacent and nearby property shall be notified no later than forty-five (45) days after the department has determined that contamination has or is likely to migrate onto adjacent or nearby property.

1. The department, or owners and operators in lieu of the department, may provide notification by certified letter to the affected property owners and occupants. The letter shall include, at a minimum:

A. The name and address of the UST owners and operators and the address of the source property.

- B. If different from that of the UST owners and operators, the name and address of the owner of the property on which the contamination originated.
 - C. The name and mailing address of the affected property owner or occupant being notified and the physical address of their property.
 - D. The name, address, and telephone number of the department's project manager for the site.
 - E. A description of the contamination and an explanation of how migration onto the adjacent or nearby property is known, suspected, or anticipated.
 - F. A statement directing the owner or occupant to direct comments to the department's project manager and specifying a comment deadline as established in section (6) of this rule.
 - G. A statement that information pertaining to the release and the department's decisions regarding the corrective action plan and other matters is or will be available from the department upon request.
 - H. If available at the time, a description of the actions proposed in owners and operator's corrective action plan to mitigate unacceptable risks associated with the contamination. A copy of the corrective action plan shall be made available to the neighboring owner or occupant at his/her request.
 - I. If the corrective action plan has not yet been developed at the time notice is made, the letter must explain the expected scope and type of corrective action activities that will be used and provide a schedule for corrective action plan development. If the corrective action plan has been developed at the time notice is made, a copy of the plan shall be provided to the party being notified.
2. If owners and operators provide notification by certified letter to the affected property owners or occupants, a copy of each notification letter, including any enclosures or attachments, and a copy of the certified mail receipt or other documentation showing that the owner or occupant of the adjacent or nearby property received the letter shall be submitted to the department within thirty (30) days of the date on which the letter was received by the affected property owner.
 3. If the corrective action plan has not yet been developed at the time the initial notice is made, a second letter shall be sent to each party initially notified once the corrective action plan has been developed. The second letter must explain the actual scope and type of corrective action activities to be used and include an implementation schedule. The second letter shall provide the affected owner or occupant a minimum of thirty (30) days from receipt of the letter in which to provide comments to the department regarding the proposed corrective action activities.
 4. Owners and operators may provide notification to the affected property owner or occupant in person or by telephone, either in addition to or instead of notification by certified letter. The notice must include the information specified at section (9)(A)1.A through I not including section (9)(A)1.C. If notification is made in person or by telephone in lieu of a certified letter, then owners and

operators shall provide the department with an affidavit documenting the notification. The affidavit shall be dated, submitted to the department within thirty (30) days of the day on which notification was made, and include the following information:

- A. The name and address of UST owners and operators and the source property address.
- B. If different from that of the UST owners and operators, the name and address of the owner of the property on which the contamination originated.
- C. The name, telephone number, and mailing address of the owner or occupant of the adjacent or nearby property being notified and the physical address of their property.
- D. A summary of the in person or telephone discussion.
- E. A statement that the owner or occupant of the adjacent or nearby property was or will be provided a copy of the corrective action plan either by certified mail (a copy of the certified mail receipt must be provided to the department) or in person.
- F. The outcome of the meeting or call and any issues raised by the person being notified that will or could hinder implementation of the corrective action plan.
- G. The owners and operator's or authorized designee's signature.

5. Documentation of response received. When owners and operators provide notification in lieu of the department, owners and operators shall inform each party being notified that the party's comments should be directed to the department. Owners and operators shall provide the party being notified with a mailing address, electronic mail address, and fax and phone numbers for the department's project manager for the site. If the party being notified submits their comments to the owner or operator, the owner or operator must forward the comments to the department within fifteen (15) days of receipt as follows:

- A. If the response is in writing, a copy shall be submitted to the department.
- B. If the response is in-person or by telephone, a dated affidavit fully explaining the notified party's response and bearing the owner and operator's signature or that of their authorized representative must be submitted to the department.

(B) Where public notice is required in accordance with subsection (2)(B) of this rule, owners and occupants of adjacent and nearby property shall be notified by the department, or owners and operators in lieu of the department, in a manner consistent with section 9(A) of this rule and with the following provisions.

- 1. The notice shall specifically pertain to implementation of the corrective action plan and the plan's failure to meet applicable target levels or otherwise successfully mitigate unacceptable risks associated with contamination.

2. The notice shall explain that, because implementation of the corrective action plan was not successful, the department has terminated or is considering terminating the corrective action plan.
3. The notice shall explain that a new corrective action plan will be developed and that a copy of the new corrective action plan will be provided to the department and to each party previously notified.
4. Once a new corrective action plan has been developed, public notice as provided for in this rule shall be undertaken by the department or, in lieu of the department, by owners and operators.

(10) Notice other than by letter, in person, or by telephone – work plan required. Where public notice is required under section (2)(A) of this rule and the department or, in lieu of the department, owners and operators, provides notice by means other than certified letter, in person, or by telephone, the content of the notice must include the information specified at section (9)(A)1.A through I not including section (9)(A)1.C. If the notice is to be provided by the owner or operator, the owner or operator must first submit a work plan to the department explaining the means by which the notice will be provided, the content of the notice, and a schedule for providing such notice. The work plan shall not be implemented until approved in writing by the department.

(A) Owners and operators shall, within thirty (30) days of providing the notice under this section, submit documentation to the department that the notice has been adequately provided in accordance with the approved work plan.

(11) Broad public notice. Where the department determines that members of the public directly affected by a release or planned corrective action is not limited to owners and occupants of adjacent and nearby property, the department, or owners and operators in lieu of the department, shall provide broad public notice subject to the following provisions.

(A) The department will determine the means by which such notice is provided by considering site-specific demographics as well as locally available media by which notice might be provided, local government capabilities, and other considerations.

(B) Where public notice is required in accordance with subsection (2)(A) of this rule, the broad public notice shall be made no later than one hundred and twenty (120) days after the department makes the determination under section (3) of this rule and at least forty-five (45) days prior to the planned implementation of the corrective action plan and prior to the department's approval of the plan.

(C) If owners and operators choose to provide broad public notice in lieu of the department, the owners and operators shall consult with the department to determine the best means for providing such notice. After consultation with the department, owners and operators shall develop a public participation plan for the department's review explaining how and when the notice is to be provided and allowing for a public comment period of at least thirty (30) days. Owners and operators shall submit the plan to the department within thirty (30) days of the department determining as specified under section (3) of this rule that broad public notice is required. Owners and operators shall not conduct broad public notice activities until the plan has been

approved by the department. The department shall review the public participation plan and respond to the owner and operator within thirty (30) days of receipt. If the department rejects the public participation plan, the department will allow owners and operators thirty (30) days in which to modify and resubmit the public participation plan to the department. The department shall review and either approve or reject the modified public participation plan within thirty (30) days of receipt. If the department rejects the modified public participation plan, the department will provide the broad public notice.

(12) Consideration and management of comments received. If the department receives comments from the public, either directly or through an owner or operator, regarding the migration of contamination off a source property, proposed corrective action activities, the failure of a corrective action plan to achieve target levels or otherwise adequately mitigate risks associated with contamination, or other related matters, then the department will:

(A) Review each comment received;

(B) Consider each comment when reviewing and either approving or rejecting the owner and operator's proposed corrective action plan;

(C) Respond to comments as appropriate under the circumstances. The department will not necessarily accept or respond to each comment received;

(D) Evaluate the comments as a whole in order to determine whether sufficient public interest exists regarding the contamination, the corrective action plan or the risk assessment such that the department should conduct further public participation activities; and

(E) Keep records of all comments received in the department's file for the subject site.

Comment [n6]: Concerns expressed to department that this (and other provisions of this and other rules) allow neighbors to "control" cleanup decisions.

AUTHORITY: Sections 319.109 and 319.137 RSMo Supp. 2007. Original rule filed February 13, 2009.*

PUBLIC ENTITY COST: The proposed rule will cost public entities \$919,886 in the aggregate annually.

PRIVATE ENTITY COST: The proposed rule will not cost private entities more than \$500 in the aggregate.

NOTICE OF PUBLIC HEARING AND NOTICE TO SUBMIT COMMENTS: The Missouri Hazardous Waste Management Commission will hold a public hearing on this rule action and others beginning at 10:30 a.m. on August 20, 2009, at the Elm Street Conference Center, 1738 East Elm Street, Jefferson City, Missouri. Any interested person will have the opportunity to testify. Advance notice is not required. However, anyone who wants to make arrangements to testify may do so prior to the hearing by contacting the secretary of the Hazardous Waste Management Commission at (573) 751-2747.

Any person may submit written comments on this rule action. Written comments shall be sent to the director of the Hazardous Waste Program at PO Box 176, Jefferson City, MO 65102-0176. To be accepted, written comments must be postmarked by midnight on August 27, 2009. Faxed or emailed correspondence will not be accepted. Please direct all inquiries to the Rules Coordinator of the Hazardous Waste Program, at 1738 E. Elm, Jefferson City, MO 65102, telephone (573) 751-3176.