

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Part 282

[EPA-R08-UST-2018-0728; FRL-10000-51-Region 8]

**North Dakota: Codification and
Incorporation by Reference of
Approved State Underground Storage
Tank Program**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule codifies in the regulations the prior approval of North Dakota's underground storage tank program and incorporates by reference approved provisions of the State's regulations. The Environmental Protection Agency (EPA) uses the regulations entitled, "Approved Underground Storage Tank Programs," to provide notification of the approval status of State programs and to incorporate by reference into the Code of Federal Regulations (CFR) those provisions of the State's regulations that are approved and that the EPA will enforce under the Resource Conservation and Recovery Act (RCRA). The EPA previously provided notification and opportunity for comments on the Agency's decisions to approve the North Dakota underground storage tank program, and the EPA is not reopening the decisions, nor requesting comments, on the approval of the North Dakota program, as published in the **Federal Register** documents specified in Section I.C of this document.

DATES: This rule is effective December 30, 2019. The Director of the Federal Register approves this incorporation by reference as of December 30, 2019, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

ADDRESSES: The documents that form the basis for this codification and associated publicly available materials are available electronically through <https://www.regulations.gov> (Docket ID No. EPA-R08-RCRA-2018-0728). You can also view and copy the documents from 8:30 a.m. to 4:00 p.m. Monday through Friday at the following location: EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, phone number (303) 312-6435. Interested persons wanting to examine these documents should make an appointment with the office at least two days in advance.

FOR FURTHER INFORMATION CONTACT: Benjamin Bents, Region 8, Project Officer, RCRA Branch, Land Chemical and Revitalization Division (8LCR-RC), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, 303-312-6435, email address: bents.benjamin@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Codification

A. What is codification?

Codification is the process of placing a State's statutes and regulations that comprise the State's approved UST program into the CFR. Section 9004(b) of RCRA, as amended, allows the EPA to approve State UST programs to operate in lieu of the Federal program. The EPA codifies its authorization of State programs in 40 CFR part 282 and incorporates by reference State regulations that the EPA will enforce under sections 9005 and 9006 of RCRA and any other applicable statutory provisions. The incorporation by reference of State authorized programs in the CFR should substantially enhance the public's ability to discern the current status of the approved State program and State requirements that can be federally enforced. This effort provides clear notification to the public of the scope of the approved program in each State.

B. Why wasn't there a proposed rule before today's rule?

The EPA is publishing this rule to codify North Dakota's approved UST program without a prior proposal because we believe this action is not controversial. The reason being that, in accordance with section 9004(b) of RCRA, EPA has already evaluated the State's regulatory and statutory requirements and has determined that the State's program meets the statutory and regulatory requirements established by RCRA. The EPA previously provided notifications and opportunity for comments on the Agency's decisions to approve the North Dakota program. The EPA is not reopening the decisions, nor requesting new comments, on the North Dakota approvals as previously published in the **Federal Register** documents specified in Section I.C of this final rule document. The previous approvals form the basis for the codification addressed in this final rule.

C. What is the history of the approval and codification of North Dakota's UST program?

On December 10, 1991 (56 FR 51333, October 11, 1991) the EPA finalized a

rule approving the UST program that North Dakota proposed to administer in lieu of the Federal UST program. The EPA incorporated by reference and codified North Dakota's then approved UST program in 40 CFR 282.84, effective August 21, 1995 (60 FR 32469; June 22, 1995). Due to unforeseen delays resulting from the lapse in appropriations, the EPA's final approvals concerning revisions to North Dakota's program originally proposed December 19, 2018, with an effective date of March 15, 2019 (83 FR 65104, December 19, 2018), were delayed. Thus, the EPA granted approval for changes to the North Dakota program effective April 30, 2019 (84 FR 8260, March 7, 2019). Through this action, the EPA is incorporating by reference and codifying North Dakota's State program in 40 CFR 282.84 to include the approved revisions.

D. What codification decisions have we made in this rule?

In this rule, we are finalizing the Federal regulatory text that incorporates by reference the federally authorized North Dakota UST Program. In accordance with the requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of the North Dakota rules described in the amendments to 40 CFR part 282 set forth below. The EPA has made, and will continue to make, these documents generally available through www.regulations.gov and/or in hard copy at the EPA Region 8 office (see the **ADDRESSES** section of this preamble for more information).

The purpose of this **Federal Register** document is to codify North Dakota's approved UST Program. The codification reflects the State program that was in effect at the time the EPA approved revisions to the North Dakota UST program addressed in the final rule published on December 19, 2018 (83 FR 65104, effective March 15, 2019). By codifying the approved North Dakota program and by amending the Code of Federal Regulations (CFR), the public will more easily be able to discern the status of the federally approved requirements of the North Dakota program.

The EPA is incorporating by reference the North Dakota approved UST program in 40 CFR 282.84. 40 CFR 282.84(d)(1)(i)(A) incorporates by reference for enforcement purposes the

State's regulations. 40 CFR 282.84 also references the Attorney General's Statement, Demonstration of Adequate Enforcement Procedures, Enforcement Agreement, the Program Description and the Memorandum of Agreement, which are approved as part of the UST program under subtitle I of RCRA.

E. What is the effect of EPA's codification of the federally authorized State UST Program on enforcement?

The EPA retains the authority under sections 9003(h), 9005 and 9006 of subtitle I of RCRA, 42 U.S.C. 6991b(h), 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake corrective action, inspections, and enforcement actions, and to issue orders in approved States. If the EPA determines it will take such actions in North Dakota, the EPA will rely on Federal sanctions, Federal inspection authorities, and other Federal procedures rather than the State analogs. Therefore, though the EPA has approved the State procedures listed in 40 CFR 282.84(d)(1)(ii), the EPA is not incorporating by reference North Dakota's procedural and enforcement authorities.

F. What State provisions are not part of the codification?

Title 40 CFR 281.12(a)(3)(ii) states that where an approved State program has provisions that are broader in coverage than the Federal program, those provisions are not a part of the federally approved program. North Dakota's approved UST program does not include provisions which are "broader in coverage" than the Federal program.

II. Statutory and Executive Order (E.O.) Reviews

This action only applies to North Dakota's UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by State law. It complies with applicable E.O.s and statutory provisions as follows:

A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). This action codifies State requirements for the purpose of RCRA section 9004 and imposes no additional requirements beyond those imposed by

State law. Therefore, this action is not subject to review by OMB.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this incorporation by reference of North Dakota's revised underground storage tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Because this action codifies pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, this action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This action will not 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely codifies State requirements as part of the State RCRA Underground Storage Tank Program without altering the relationship or the distribution of power and responsibilities established by RCRA.

E. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks.

F. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a "significant regulatory action" as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

The requirements being codified are the result of North Dakota's voluntary participation in the EPA's State program approval process under RCRA subtitle I. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the "Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" issued under the executive order.

J. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). "Burden" is defined at 5 CFR 1320.3(b).

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income

populations in the United States. Because this rule codifies pre-existing State rules, which are at least equivalent to, consistent with, and no less stringent than existing Federal requirements, and imposes no additional requirements beyond those imposed by State law, and there are no anticipated significant adverse human health or environmental effects, the rule is not subject to Executive Order 12898.

L. Congressional Review Act

The EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This action will be effective November 29, 2019.

Authority: This rule is issued under the authority of Sections 2002(a), 7004(b), and 9004, 9005 and 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), and 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 282

Environmental protection, Administrative practice and procedure, Hazardous substances, Incorporation by reference, State program approval, and Underground storage tanks.

Dated: November 15, 2019.

Gregory Sopkin,

Regional Administrator, EPA Region 8.

For the reasons set forth in the preamble, EPA is amending 40 CFR part 282 as follows:

PART 282—APPROVED UNDERGROUND STORAGE TANK PROGRAMS

■ 1. The authority citation for part 282 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991c, 6991d, and 6991e.

■ 2. Revise § 282.84 to read as follows:

§ 282.84 North Dakota State-Administered Program.

(a) *History of the approval of North Dakota’s Program.* The State of North Dakota is approved to administer and enforce an underground storage tank program in lieu of the Federal program under subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 *et seq.* The State’s program, as administered by the North Dakota Department of Environmental Quality (DEQ) was approved by EPA pursuant to

42 U.S.C. 6991c and part 281 of this chapter. The EPA published the notice of final determination approving the North Dakota underground storage tank base program effective on December 10, 1991. A subsequent program revision application was approved by EPA and became effective on March 15, 2019.

(b) *Enforcement authority.* North Dakota has primary responsibility for administering and enforcing its federally approved underground storage tank program. However, EPA retains the authority to exercise its corrective action, inspection, and enforcement authorities under sections 9003(h), 9005, and 9006 of subtitle I of RCRA, 42 U.S.C. 6991b(h), 6991d and 6991e, as well as under any other applicable statutory and regulatory provisions.

(c) *Approval.* To retain program approval, North Dakota must revise its approved program to adopt new changes to the Federal subtitle I program which make it more stringent, in accordance with section 9004 of RCRA, 42 U.S.C. 6991c, and 40 CFR part 281, subpart E. If North Dakota obtains approval for the revised requirements pursuant to section 9004 of RCRA, 42 U.S.C. 6991c, the newly approved statutory and regulatory provisions will be added to this subpart and notice of any change will be published in the **Federal Register**.

(d) *Program authorization.* North Dakota has final approval for the following elements of its program application originally submitted to EPA and approved effective December 10, 1991, and the program revision application approved by EPA effective on March 15, 2019:

(1) *State statutes and regulations—(i) Incorporation by reference.* The North Dakota provisions cited in this paragraph and listed in Appendix A to this part, are incorporated by reference as part of the underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.* The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain copies of the North Dakota regulations that are incorporated by reference in this paragraph from North Dakota Legislative Council, Second Floor, State Capitol, 600 E Boulevard Avenue, Bismarck, North Dakota 58504, phone 701-328-2916, website: <https://www.legis.nd.gov/agency-rules/north-dakota-administrative-code>. You may inspect a copy at EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202 (Phone number 303-312-6231 or the National Archives and Records Administration (NARA). For information on the

availability of the material at NARA, email fedreg.legal@nara.gov or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

(A) “EPA-Approved North Dakota Regulatory Requirements Applicable to the Underground Storage Tank Program,” dated April 2019.

(B) [Reserved]

(ii) *Legal basis.* EPA evaluated the following statutes and regulations which provide the legal basis for the State’s implementation of the underground storage tank program, but they are not being incorporated by reference and do not replace Federal authorities:

(A) The statutory provisions include: North Dakota Century Code (2019), Title 1 “General Provisions,” Chapter 1-01, “General Principles and Definitions,” Section 1-01-49(8) “Person;” Title 23.1 “Environmental Quality,” Chapter 01 “Department of Environmental Quality,” Sections 23.1-01-01 and 23.1-01-04; Chapter 04 “Hazardous Waste Management,” Sections 23.1-04-01 introductory paragraph, .1, .5, and .6; 23.1-04-02 introductory paragraph, .2, .9 through .11, and .16; 23.1-04-03; 23.1-04-06; and 23.1-04-12 through 23.1-04-15.

(B) The regulatory provisions include: North Dakota Administrative Code Chapter 33.1-24-08, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, as amended effective January 1, 2019, Sections 33.1-24-08-36 Applicability (Delivery Prohibition), 33.1-24-08-37 Criteria for Delivery Prohibition, and 33.1-24-08-57 Public Participation.

(2) *Statement of legal authority.* The Attorney General’s Statement, signed by the Attorney General of North Dakota on February 28, 1991, and by the Assistant Attorney General on July 26, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(3) *Demonstration of procedures for adequate enforcement.* The “Demonstration of Procedures for Adequate Enforcement” submitted as part of the original application on April 4, 1991, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(4) *Enforcement Agreement.* The “North Dakota State and EPA Region 8 Enforcement Agreement” submitted as part of the program revision application on July 26, 2018, though not incorporated by reference, is referenced

as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(5) *Program description.* The program description and any other material submitted as part of the original application April 4, 1991, and as part of the program revision application on July 26, 2018, though not incorporated by reference, are referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

(6) *Memorandum of Agreement.* The Memorandum of Agreement between North Dakota and the EPA Region 8, signed by the EPA Regional Administrator on November 9, 2018, though not incorporated by reference, is referenced as part of the approved underground storage tank program under subtitle I of RCRA, 42 U.S.C. 6991 *et seq.*

■ 3. Appendix A to part 282 is amended by revising the entry for “North Dakota” to read as follows:

Appendix A to Part 282—State Requirements Incorporated by Reference in Part 282 of the Code of Federal Regulations

* * * * *

North Dakota

(a) The regulatory provisions include: North Dakota Administrative Code (NDAC), Chapter 33.1–24–08, Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, as amended effective January 1, 2019:

Section 33.1–24–08–01 Applicability (technical standards and corrective action).
 Section 33.1–24–08–02 Installation requirements for partially excluded underground storage tank systems.
 Section 33.1–24–08–03 Definitions (technical standards, delivery prohibition, and corrective action).
 Section 33.1–24–08–10 Performance standards for new underground storage tank systems.
 Section 33.1–24–08–11 Upgrading of existing underground storage tank systems.
 Section 33.1–24–08–12 Notification requirements.
 Section 33.1–24–08–20 Spill and overflow control.
 Section 33.1–24–08–21 Operation and maintenance of corrosion protection.
 Section 33.1–24–08–22 Compatibility.
 Section 33.1–24–08–23 Repairs allowed.
 Section 33.1–24–08–24 Reporting and recordkeeping.
 Section 33.1–24–08–25 Periodic testing of spill prevention equipment and containment sumps used for interstitial monitoring of piping and periodic inspection of overflow prevention equipment.

Section 33.1–24–08–26 Periodic operation and maintenance walkthrough inspections.
 Section 33.1–24–08–30 General release detection requirements for all underground storage tank systems.
 Section 33.1–24–08–31 Release detection requirements for petroleum underground storage tank systems.
 Section 33.1–24–08–32 Release detection requirements for hazardous substance underground storage tank systems.
 Section 33.1–24–08–33 Methods of release detection for tanks.
 Section 33.1–24–08–34 Methods of release detection for piping.
 Section 33.1–24–08–35 Release detection recordkeeping.
 Section 33.1–24–08–38 Mechanisms for designating tanks ineligible for delivery.
 Section 33.1–24–08–39 Reclassifying ineligible tanks as eligible for delivery.
 Section 33.1–24–08–40 Reporting of suspected releases.
 Section 33.1–24–08–41 Investigation due to offsite impacts.
 Section 33.1–24–08–42 Release investigation and confirmation steps.
 Section 33.1–24–08–43 Reporting and cleanup of spills and overfills.
 Section 33.1–24–08–44 Unattended cardrol facilities.
 Section 33.1–24–08–45 Operator designations and requirements for operator training.
 Section 33.1–24–08–46 Timing of operator training and reciprocity.
 Section 33.1–24–08–47 Operator retraining.
 Section 33.1–24–08–48 Operator training documentation.
 Section 33.1–24–08–50 General release response and corrective action for underground storage tank systems containing petroleum or hazardous substances.
 Section 33.1–24–08–51 Initial response.
 Section 33.1–24–08–52 Initial abatement measures and site check.
 Section 33.1–24–08–53 Initial site characterization.
 Section 33.1–24–08–54 Free product removal.
 Section 33.1–24–08–55 Investigations for soil and groundwater cleanup.
 Section 33.1–24–08–56 Corrective action plan.
 Section 33.1–24–08–60 Temporary closure.
 Section 33.1–24–08–61 Permanent closure and changes in service.
 Section 33.1–24–08–62 Assessing the site at closure or change in service.
 Section 33.1–24–08–63 Applicability to previously closed underground storage tank systems.
 Section 33.1–24–08–64 Closure records.
 Section 33.1–24–08–70 UST systems with field-constructed tanks and airport hydrant fuel distribution systems definitions.
 Section 33.1–24–08–71 General requirements.
 Section 33.1–24–08–72 Additions, exceptions, and alternatives for UST systems with field-constructed tanks and airport hydrant systems.
 Section 33.1–24–08–80 Applicability (financial responsibility).

Section 33.1–24–08–81 Financial responsibility compliance dates.
 Section 33.1–24–08–82 Definitions (financial responsibility).
 Section 33.1–24–08–83 Amount and scope of required financial responsibility.
 Section 33.1–24–08–84 Allowable mechanisms and combinations of mechanisms.
 Section 33.1–24–08–85 Financial test of self-insurance.
 Section 33.1–24–08–86 Guarantee.
 Section 33.1–24–08–87 Insurance and risk retention group coverage.
 Section 33.1–24–08–88 Surety bond.
 Section 33.1–24–08–89 Letter of credit.
 Section 33.1–24–08–92 Trust fund.
 Section 33.1–24–08–93 Standby trust fund.
 Section 33.1–24–08–94 Local government bond rating test.
 Section 33.1–24–08–95 Local government financial test.
 Section 33.1–24–08–96 Local government guarantee.
 Section 33.1–24–08–97 Local government fund.
 Section 33.1–24–08–98 Substitution of financial assurance mechanisms by owner or operator.
 Section 33.1–24–08–99 Cancellation or nonrenewal by a provider of financial assurance.
 Section 33.1–24–08–100 Reporting by owner or operator.
 Section 33.1–24–08–101 Recordkeeping.
 Section 33.1–24–08–102 Drawing on financial assurance mechanisms.
 Section 33.1–24–08–103 Release from requirements.
 Section 33.1–24–08–104 Bankruptcy or other incapacity of owner or operator or provider of financial assurance.
 Section 33.1–24–08–105 Replenishment of guarantees, letters of credit, or surety bonds.
 Section 33.1–24–08–115 Definitions (lender liability).
 Section 33.1–24–08–120 Participation in management (lender liability).
 Section 33.1–24–08–125 Ownership of an underground storage tank or underground storage tank system or facility or property on which an underground storage tank or underground storage tank system is located (lender liability).
 Section 33.1–24–08–130 Operating an underground storage tank or underground storage tank system (lender liability).

Appendix I.

Appendix II Statement of Shipping Tickets and Invoices.

(b) Copies of the North Dakota regulations that are incorporated by reference are available from North Dakota Legislative Council, Second Floor, State Capitol, 600 E Boulevard Avenue, Bismarck, North Dakota 58504; phone, 701–328–2916; website, <https://www.legis.nd.gov/agency-rules/north-dakota-administrative-code>.

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