

## Department response to comments

### Amendments to Hawaii Administrative Rules chapter 11-280.1 proposed October 29 and 30, 2019

#### Hawaii Department of Health

##### Notes:

Comments have been summarized. All written comments received and the transcript of the public hearing held on December 2, 2019 are available at <http://health.hawaii.gov/shwb/ust-har/>.

All section numbers refer to the proposed chapter 11-280.1, Hawaii Administrative Rules (HAR), unless otherwise noted.

At this time the department is responding only to comments unrelated to the proposed change to §11-280.1-21 regarding upgrades to airport hydrant fuel distribution systems and underground storage tank (UST) systems with field-constructed tanks. The department has received many comments pertaining to the proposed changes to §11-280.1-21 and defers action on the proposed changes to this section due to the volume of comments, the complexity of the technical issues involved with implementing the proposed changes, and the need to collect additional information about the implications of changes to this section. In addition, the department is aware that current SB2774 pertains to the same subject matter as §11-280.1-21 and would prefer not to make substantive changes to this section of the rule until the intent of the 2020 legislature has been realized.

---

**Commenter:** Neil Nakai, Inc. (Neil I. Nakai, President)

**Comment #1:** My comment/suggestion pertains to 11-281.1-52 1 (System Test). Can the allowable related to a confirmation testing requirements stated in 11-281-33 (4), (5) & (6) and 11-281.1-43 (3) and 11-281.1-44(2) that are related to a repair to the UST System, UST and piping be clarified to remove the term "UST System" and just refer to them as "UST" and "Piping"? There have been arguments in the past when a section of piping is repaired and tested using the required 0.1-gph piping test method that the UST has to also be tested even though the UST is double-walled and has a properly functioning leak detection system. The term "UST System Test" has caused some DOH Inspectors to require that a test be conducted on the UST as well, even though no problems were observed with the UST. The same issue would apply to the testing requirements to piping if only the UST were repaired due to a leak. Can this language be revised to remove the need to test piping if the UST is repaired and vice versa?

**Response:** Thank you for your comment. The department is finalizing the change to §11-280.1-52(b)(1) as proposed. This change clarifies the intent of the existing regulation, which is for both tanks and piping to be tested when investigating a suspected release and for both

tightness testing of the inner wall and secondary containment integrity testing of the interstitial space to occur when appropriate.

The intent of the section titled “Release investigation and confirmation steps” (now §11-280.1-52) has always been “to determine whether a leak exists in *any portion* of the UST system” (§11-281-63(b)(1) in 2013 rules; emphasis added). The 1988 federal and 2000 state rules reflect this as “to determine whether a leak exists in that portion of *the UST* that routinely contains product, *or the attached delivery piping, or both*” (federal Title 40 Code of Federal Regulations (40 CFR) §280.52(a), state §11-281-63(b)(1); emphasis added). The term “system test” is used in §11-280.1-52(b)(1) specifically to indicate the entire UST system, meaning both tanks and attached piping (see definition in §11-280.1-12). When there is a suspected release, both the tank and the piping must be tested to determine the presence of a leak.

Note that when piping is repaired, but there is no suspected release, only the piping must be tested (§11-280.1-33(a)(5); likewise for a tank repaired when there is no suspected release).

---

**Commenter:** Par Hawaii

**Comment #2:** This comment is regarding paragraph §11-280.1-21(a)(2) requiring UST systems to be double-walled with interstitial monitoring by July 15, 2028. While we agree with the nature and intent of the regulation, we respectfully request that the Department of Health (the “Department”) consider either an extension to the deadline or an alternative method of release detection for double-walled piping installed before August 9, 2013. The Federal EPA UST regulation does not require UST systems installed prior to April 11, 2016 to be upgraded to double-walled with interstitial monitoring.

The current Hawaii UST regulation requires containment sumps “used for the interstitial monitoring of piping” to be liquid tight and tested every 3 years [§11-280.1-35(a)(2)]. With Hawaii requiring interstitial monitoring as the only allowable method of release detection for double-walled piping by July 15, 2028, this consequently requires all UST systems’ turbine sumps and UDCs to be tested and liquid tight by July 15, 2028.

Although most of the UST system piping in Hawaii is already double-walled, many UST systems may not have liquid tight UDCs/turbine sumps, as it was not required for systems installed prior to the 2013 regulation. Therefore, every UST owner, even if they have already installed double-walled UST systems, will need to test and potentially replace or retrofit countless sumps in the next 8.5 years. There are only a few qualified UST repair companies in Hawaii to make these kinds of repairs.

There are also a limited number of approved sump test procedures and a limited number of qualified vendors to perform sump testing. If water is used as part of the approved PEI RP1200 hydrostatic test procedure (low or high level), there may be hazardous waste generated, which creates additional costs.

As a potential solution, we respectfully request that the Department recognize the costs to UST operators and accept the continued use of annual line tightness testing for double-walled piping installed prior to August 9, 2013. [This which would have the effect that fewer sumps would require testing under §11-280.1-35(a)(2).]

Par Hawaii is not a small business as defined by chapter 201M, HRS. However, we would like to point out that the Small Business Impact assessment created prior to the promulgation of chapter 11-280.1 (on July 15, 2018) only speaks to the upgrades required for single-walled systems to be upgraded to double-walled systems. It does not assess the impacts to small businesses that already have invested in double-walled systems but will now need to repair or replace several UDCs and sumps. Additionally, the cost of testing sumps every 3 years is typically higher than the cost to perform an annual line tightness test.

**Response:** This comment is outside the scope of the proposed rule changes, but the department appreciates the opportunity to clarify changes made to the UST rules in 2018.

This comment is addressing three different issues, as they pertain to UST systems other than airport hydrant distribution systems and UST systems with field-constructed tanks:

1. Requirement for interstitial monitoring of piping
2. Requirement for periodic testing of sumps
3. Sump testing methods

The secondary containment requirement cited by the commenter is not a new requirement, but was proposed to be moved from §11-280.1-21(b) to §11-280.1-21(a)(2) (the department is not finalizing this proposed change, therefore, the requirement will remain in §11-280.1-21(b)). The interstitial monitoring of piping installed prior to August 9, 2013 is likewise already required by §11-280.1-41(b)(2). The department believes that the requirement for interstitial monitoring of this piping provides added protection for human health and the environment. The department is aware that its requirements are more stringent than the federal requirements, and they are intended to be.

The commenter appears to have an overly broad interpretation of the applicability of the existing requirement for periodic testing of containment sumps used for interstitial monitoring of piping (§11-280.1-35(a)(2)). The requirement in §11-280.1-35(a)(2) applies *only* to those containment sumps used for interstitial monitoring of piping; it does not apply to every sump associated with a double-walled piping run that is using interstitial monitoring to meet the release detection requirements of §11-280.1-41.

A containment sump used for interstitial monitoring of piping is typically located at the lowest point in the piping run and contains a sensor monitoring the piping's interstitial space. Dispenser system components such as flexible connectors are not considered part of piping; rather, the dispenser system components "connect the dispenser to the underground piping" ("dispenser system" definition, §11-280.1-12). If the sensor in a UDC is monitoring secondary

containment for dispenser system components only, the UDC is not part of the interstitial monitoring of the piping.

The department appreciates the concern for the proper management of wastewater generated by sump testing under the state's hazardous waste regulations. The department is currently aware of two alternatives to the PEI RP1200 test procedure listed in §11-280.1-38(f) that may be used to meet the requirement in §11-280.1-35(a)(2)(B):

- Dri-Sump™ Containment Tightness Test Method has been tested by Ken Wilcox Associates, a code and standard developing organization recognized by the U.S. Environmental Protection Agency (EPA).
- DPLeak Leak Detection and Leak Location Method™ has been tested by Ken Wilcox Associates, a code and standard developing organization recognized by the EPA.

The department does not issue determination letters on codes of practice developed by nationally recognized associations or independent testing laboratories to permit these methods to be used under §11-280.1-35(1)(B)(iii) because they are already allowed under §11-280.1-35(a)(1)(B)(ii).

In addition, the department has determined that the Low Liquid Level UST Containment Sump Testing Procedure described by EPA in their UST technical compendium is no less protective of human health and the environment than the requirements listed in §11-280.1-35(a)(1)(B)(i) and (ii). Therefore, the department is now approving the Low Liquid Level UST Containment Sump Testing Procedure for use under §11-280.1-35(a)(1)(B)(iii). Documents describing the approved procedure are attached to this response to comments for reference (Attachment 1).

Any concerns about the costs associated with repairing and replacing defective sumps (above and beyond the cost of testing their integrity) not being properly evaluated in the department's small business impact statement seem to be based upon the mistaken presumption that these costs are new, additional costs created by the requirement to periodically test the integrity of containment sumps. This is not the case because owners and operators of UST systems were already required to have properly functioning containment sumps at all times, and problems must be fixed when they are discovered. The periodic testing of containment sumps used for interstitial monitoring of piping may simply reveal existing problems earlier than if no tests were conducted, resulting in repair or replacement of defective sumps sooner rather than later.

Proposed regulations that affect small businesses are defined as those that "will cause a direct and significant economic burden upon a small business" (§201M-1, Hawaii Revised Statutes (HRS)). Due to both the small number of affected containment sumps per UST system and the small number of UST systems owned per small business, the department determined that the requirement for periodic testing of containment sumps would not affect small businesses. Contact persons for owners and operators of all UST systems within the state were included on

the mailing list for announcements regarding the proposal for the rulemaking finalized in July 2018, and the department received no comments from small businesses.

---

**Commenter:** Honolulu Board of Water Supply

**Comment #3:** The department should eliminate all discretionary exemptions for large, field-constructed USTs from the UST rules.

Specifically, the BWS urges the department to modify the language of the proposed rules to eliminate the potential for application of the following discretionary exemptions to USTs or UST systems with a capacity greater than 50,000 gallons:

- §11-280.1-20(b)(5) - Tank construction and corrosion protection
- §11-280.1-332- Variances

These exemptions should be removed for such high-risk USTs and UST systems.

**Response:** This comment is outside the scope of the proposed rule changes.

Both provisions mentioned by the commenter apply to the department's discretion in regulating all USTs, not only to large field-constructed tanks.

The allowance in 11-280.1-20(b)(5) for alternative tank designs that the department determines are no less protective than the designs specified in §11-280.1-20(b)(1) to (4) has been part of the state UST rules since their original adoption in 2000. The EPA included the same language in its original 1988 UST rules because the agency "does not desire to restrict or eliminate emerging technologies and recognizes the numerous site-specific factors that may allow for the use of alternative designs" (53 FR 37082 p. 37127).

The department's authority to grant variances, which is derived from chapter 342L, HRS, is also designed to enable the department to more effectively regulate USTs. The commenter's proposed modification to §11-280.1-332 limiting the department's regulatory authority would effectively substitute the Board of Water Supply's current preferences for the department's subject matter expertise and discretion. The department is not the object of these regulations, rather it is the department's job to enforce them and as such, and as a matter of public policy, will not adopt rules that would restrict the authority granted to it by the legislature. The statutes and rules regarding variances speak to the fact that, in a particular set of circumstances, granting a variance may be in the interest of public health and the environment and the department is the agency best equipped to make that determination.

---

**Commenter:** Gina Hara

**Comment #4:** I don't understand why the TPH-d has been changed last year in October, and that answer hasn't been gotten. It's a hundred parts per UL, U over L, so per liter. But I don't understand why now it's 400. It looks really bad and it's wrong to do that without us knowing about it.

**Response:** This comment is outside the scope of the proposed rule changes. However, the department welcomes the opportunity to address a possible misunderstanding.

The commenter is referring to the Tier 1 Screening Level for Total Petroleum Hydrocarbons (TPH)—middle distillates (TPH-d) for groundwater listed under “drinking water source threatened” in Table 1 in §11-280.1-65.3(e). Table 1 replaced the table in §11-281-80.1 when chapter 11-281, HAR, was repealed and replaced with chapter 11-280.1, HAR, effective July 15, 2018. The groundwater screening level for TPH-d on the left side of the table (drinking water source threatened) was changed from 100 to 400 micrograms per liter (ug/L) as part of a comprehensive update of the table to reflect the most current Tier 1 Environmental Action Levels (EALs) set by the department's Hazard Evaluation and Emergency Response (HEER) Office. The technical background of the TPH action levels is discussed in Appendix 1, Section 6 of the HEER Office guidance document *Evaluation of Environmental Hazards at Sites with Contaminated Soil and Groundwater* (<https://health.hawaii.gov/heer/files/2019/11/Volume-2-App-1-HDOH-2017.pdf>).

The most recent update of the EALs by the HEER Office was completed in Fall 2017. The proposed version of Table 1 in chapter 11-280.1 was shared with the public by the UST Program beginning on December 20, 2017. The rulemaking action included a public comment period between April 30, 2018 and June 5, 2018. The department did not receive any comments on the proposed changes to Table 1 and those changed became effective on July 15, 2018.

Note that the function of Table 1 in chapter 11-280.1 is to provide a general baseline for site cleanup criteria at all UST sites. Section 11-280.1-65.3(c) specifically notes that “The department may require the owners and operators to modify cleanup activities being performed at a site if the department determines that the activities...are not achieving cleanup levels that are protective of human health and the environment.” Site-specific action levels as approved by the department can be imposed as an alternative to the Default Tier 1 Screening Levels if the department believes that this is necessary for the protection of human health and the environment.

The commenter may be also be referring to correspondence between the Board of Water Supply (BWS) and the department regarding the Fall 2017 update to the EALs. The department responded to BWS's request for an explanation of the basis for the increase in the EAL for TPH-d on October 22, 2018. In that letter, the department explained that “the increase in the HDOH drinking water action level for TPHmd from 0.10 mg/L to 0.40 mg/L [or from 100 ug/L to 400 ug/L] was based on a review of original reference documents and a more up-to-date

understanding of the physiochemical and toxicological nature of TPH-related compounds in groundwater following a release of fuel.” The letter also lists various considerations incorporated into the development of the EAL, goes into some scientific detail regarding volatility, biological degradation, and laboratory testing for hydrocarbon compounds, and notes that the department considers the Fall 2017 EALs “highly conservative for screening of groundwater data at the majority of petroleum-release sites overseen by HDOH.” A copy of the (ongoing) correspondence is attached to this response to comments for reference (Attachment 2).

The HEER Office is currently in the process of working on an update to the EALs that are expected to be finalized in summer 2020, including possible changes to the TPH action levels. Further information on the EALs can be found on the HEER Office’s website at: <https://health.hawaii.gov/heer/guidance/ehe-and-eals/>

---

**Commenters:** Honolulu City Councilmember Carol Fukunaga, Board of Water Supply (Ernie Lau), Tyrone Tahara, Ellen Sofio, Kealohilani Wong, Gina Hara, Kapua Keli’ikoa-Kamai, Colleen Soares

**Comment #5:** The public hearing should be held in a larger, more central or less remote venue and outside of regular working hours. The venue should have a microphone and speaker system. People, especially Hawaiians, want to speak face to face about anything that’s meaningful rather than submit written comments. There should be media coverage of the public hearing. Hearings should not be scheduled near the holidays.

**Response:** The hearing location (the State Laboratory) was selected because it is a department facility located near the department’s Solid and Hazardous Waste Branch office that is large enough to accommodate up to 100 people and has been used for public hearings on proposed rulemakings in the past. This location in Pearl City is actually relatively central relative to the island of O’ahu as a whole and has ample free parking. Public hearings for administrative rulemaking are typically conducting during regular working hours because civil service staff are involved in running the hearing.

The hearings officer did not anticipate a need for a speaker system because in the past being able to hear speakers without the use of amplification in this room has not been a problem. In addition, the department did not receive any requests for auxiliary aids or services prior to the hearing. Members of the public who indicated they had difficulty hearing were invited to move down to the many empty seats at the front of the auditorium and a transcript of the public hearing was posted online within two weeks of the hearing date. The department will consider ensuring the availability of a microphone and speaker system for future public hearings.

The department appreciates the comments regarding the preference for community members to give oral testimony rather than submitting written testimony and will consider this in scheduling future public hearings.

The hearings officer noted the presence of members of the media representing both television and radio at the public hearing.

The department does not consider December 2, 2019 to be on or near a holiday. In fact, in scheduling the hearing as soon as possible after preparation of the public notice, consideration was given to holiday schedules by *not* scheduling the hearing for November 29 (the day after Thanksgiving), although this is not a State Holiday.

---

**Commenter:** Amy Chiang

**Comment #6:** The deadlines for public comment are too short and those that comments represent only a small fraction of the population. I believe that many, if not most people, would agree with my comments, however, we are all so busy juggling our lives that it is hard to voice our views. Please continue to provide more forums and opportunities for the community to communicate its concerns.

**Response:** The procedures for administrative rulemaking contained in §91-3, HRS, and §11-1-53, HAR, result in a minimum public comment period of thirty-five days. The comment period for this rulemaking was considerably longer than the minimum, at fifty-three days (October 25 to December 16, 2019).