

**STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF PROPOSED
AMENDMENTS TO 20.5.17 NMAC,
PETROLEUM STORAGE TANK REGULATIONS**

No. PST 08-44(R)

PETITION FOR REGULATORY CHANGE

Pursuant to the Ground Water Protection Act, Section 74-6B-1 et seq. NMSA 1978; the Department of Environment Act, Section 9-7A-6 NMSA 1978; and the rules of the New Mexico Environment Department (the Department), 20.1.9 NMAC; the Petroleum Storage Tank Bureau (the Bureau) of the New Mexico Environment Department respectfully requests a hearing be scheduled at 9:00 a.m. on March 11, 2009, on its proposed amendments to the New Mexico Petroleum Storage Tank rules, 20.5.17 NMAC, Corrective Action Fund Administration.

Initially prompted by requirements in the federal Energy Policy Act of 2005, the Bureau has undertaken a comprehensive review and revision of its petroleum storage tank rules. This review, as well as the subsequent drafting and revision of amendments, included extensive consultation with stakeholders. For example, between August and November 2008, the Bureau has held stakeholder meetings on the proposed rules in Santa Fe, Farmington, Roswell, and Albuquerque, and has revised the draft amendments as a result of stakeholder input. Moreover, in order to encourage participation from all stakeholders, to gather complete information about the rules, and to comply with Environmental Justice standards established in Executive Order 2005-056, the Bureau substantially expanded its stakeholder list, and its invitation to stakeholder meetings, to include public interest groups, certified tank installers and tribal representatives and members.

The amendments proposed to Part 17 as a result of this review and consultation with stakeholders, are intended to: streamline and reformat the rules to comply with NMAC requirements; improve the Bureau's ability to effectively manage and maintain the solvency of the Corrective Action Fund (CAF); clarify existing and new departmental procedures for compliance determinations, contractor selection, workplan approval, approval of

deliverables, submission of claims for payment, and applications for a zero or reduced deductible; conform the rules to existing Department forms; alleviate certain administrative burdens for owners, operators, and contractors; allow for the appointment of a designated representative to facilitate compliance with corrective action activities; expand administrative review opportunities to contractors and others; and increase the amounts paid for work performed by contractors and for use of certain field equipment.

Part 17 with the proposed amendments, as well as a Statement of Reasons for the proposed amendments, are attached to this Petition. The Bureau estimates that the hearing will take three hours, including an opportunity for testimony from various stakeholders and members of the public. The Bureau does not anticipate significant controversy concerning the proposed amendments or substantial critical testimony.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

Original signed by Beth Ann Gillia
Beth Ann Gillia, Senior Attorney
Institute of Public Law
MSC11 6060
1 University of New Mexico
Albuquerque, New Mexico 87131-0001
Telephone: 505-277-0710

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Date

**STATEMENT OF REASONS FOR PROPOSED AMENDMENTS TO
TITLE 20, CHAPTER 5, PART 17 NMAC**

For the reasons noted briefly in the attached Petition, the Petroleum Storage Tank Bureau (the Bureau) of the New Mexico Environment Department (the Department) proposes to amend 20.5.17 NMAC, Corrective Action Fund Administration. Each proposed change, and the reasons therefore, are described in this Statement of Reasons (Statement). In order to avoid duplicating the live testimony and repeating the language of the extensive proposed amendments to the rules, the remainder of this Statement will group the proposed changes by sections within Part 17. Consequently, this Statement will be best understood if read in conjunction with the proposed amendments. Unless otherwise indicated, citations to New Mexico rules in this document are citations to the proposed rules, which are renumbered to comply with NMAC formatting requirements.

General Changes

The following changes are proposed throughout Part 17 where relevant.

A. To improve clarity and ease of use:

1. sections are shorter and easier to comprehend;
2. active voice replaces passive voice;
3. rules and forms are conformed and clarification is provided as to where forms and

reports may be obtained and submitted; and

4. internal rule citations are conformed.

B. To comply with NMAC formatting and style requirements, the proposed rules have been

renumbered and reformatted.

Section 7 (Definitions)

The Bureau proposes to:

A. delete definitions of general applicability, such as “deductible,” “director,” “facility,” and “incurred,” because they are now included in Part 1 of the rules;

B. delete the definition of “small business” because it is no longer used in the rules;

C. add a definition of “payment,” which will include both reimbursement to an owner or operator or direct payment to a contractor on behalf of an owner or operator; and

D. add a definition of “state-lead site” to distinguish such a site from a “responsible party-lead site.”

Section 11 (Compliance Determinations)

The Bureau proposes to:

A. clarify that the compliance determination considers compliance during the entire term of ownership;

B. eliminate the unnecessarily burdensome requirement that owners or operators request a compliance determination before submitting each request for payment from the CAF; instead the Bureau proposes to require owners or operators to request a compliance determination only before submitting the first request for payment from the CAF;

C. allow the Bureau to initiate, or the owner or operator to request, subsequent compliance determinations at any phase of corrective action in order to ensure that owners and operators remain in continuous compliance; and

D. clarify that a compliance determination is not necessary when an owner or operator seeks payment from the CAF for the costs of the Minimum Site Assessment (MSA) that exceed the deductible, but that the department shall confirm, prior to payment, that the work performed meets the definition of an MSA.

Section 13 (Procedures for Determining Compliance)

A. The Bureau proposes to conform the rule to the Bureau’s existing forms by including a description of all information and documentation required to be submitted when an owner or operator requests a compliance determination.

B. When the Bureau initiates a compliance determination, the proposed rule would require the Bureau to notify owners and operators in writing of the reason for the compliance determination and to inform the owner or operator that a finding of noncompliance will result in ineligibility for payment of corrective action costs from the CAF, except for the costs of an MSA.

C. The proposed rule would extend the period in which the Bureau must inform owners and operators of any inadequacies in their written submissions from 30 to 45 days.

D. The proposed rule would require the Bureau to promptly notify owners and operators when it has made a compliance determination. In addition to notifying an owner or operator of the reason for any finding of noncompliance, the Bureau would be required to inform the owner or operator that he or she is ineligible for payment of corrective action costs other than the costs of an MSA.

Section 14 (Competitive Contractor Selection for Remediation at Responsible Party-Lead Sites)

A. For clarity, the Bureau proposes to distinguish in the title that this section applies only to responsible-party lead sites.

B. In addition, the Bureau proposes to delete an unnecessary provision that allows it to require new competitive proposals when it determines that a contractor's performance of corrective action activities is unsatisfactory. This provision is unnecessary because the Bureau is not obligated to continue using a contractor that does not perform satisfactorily.

Section 15 (Procedures and Requirements for Selection of Remediation Contractors at Responsible Party-Lead Sites)

The Bureau proposes to:

A. clarify in the title that this section applies to contractor selection at responsible-party lead sites only;

B. simplify the proposal process by eliminating the requirement that all initial proposals include cost projections and require only short-listed firms to submit costs; and

C. reduce publication costs and increase efficiency by allowing the Bureau to solicit proposals, announce specifications, and answer inquiries about solicitations on its webpage (when the owner or operator does not provide a list of contractors).

Section 16 (Procedures and Requirements for Selection of Remediation Contractors at State-Lead Sites)

The Bureau proposes to add a new section clarifying that remediation contractors for state-lead sites will be selected following the procedures in the Procurement Code, sections 13-1-21 through 13-1-199 NMSA 1978, 1.4.1 NMAC, and the Request for Proposals Procurement Guide.

Section 17 (Workplan Approval, Change Orders for Corrective Action and Approval of Deliverables)

To streamline the process of approving and paying for deliverables, the proposed changes would require:

A. the Bureau to issue promptly a written or electronic notice of approval to owners, operators or contractors once it approves a deliverable as satisfactory;

B. the notice of approval to explain that any application for payment of costs associated with the approved deliverable must be received by the Bureau within 90 days of receipt of the notice and that this deadline would be extended for good cause only; and

C. the Bureau to provide a written or electronic notice of exception to owners, operators or contractors within 30 days of receiving an unsatisfactory deliverable that explains the defect in the deliverable and any steps the owner, operator or contractor may take to remedy the defect.

Section 18 (Corrective Action Eligible and Ineligible Costs and Expenditures)

The Bureau proposes to:

A. clarify in the title that this section applies to both responsible party-lead sites and state-lead sites;

B. prevent owners and operators from filing claims for payment before approval by clarifying that payments from the fund shall be made for only those deliverables that the Bureau has approved as satisfactory in writing;

C. eliminate the requirement that an owner or operator file an insurance claim before applying to the CAF for payment; and

D. clarify that the CAF will not pay for the costs of repairing or replacing remediation equipment or groundwater monitoring wells that were negligently or intentionally damaged or destroyed by the owner or operator.

Section 19 (Designated Representatives)

The Bureau proposes to create a new category of individuals (“designated representatives”) who will facilitate corrective action activities and compliance with Parts 7, 12 or 13, 15, 16 and 17 when an owner or operator is unavailable or unable to fulfill these obligations. This new section will allow owners or operators to designate a representative or, when an owner or operator is incapable of directing corrective action and assigning rights

to the fund, will allow other individuals to request designation as a representative by the Bureau. Designation as a representative will require approval by the Department and will include assignment from the owner or operator to the designated representative of all rights to payment from the CAF that the owner or operator enjoys. The proposed rule would not release the owner or operator from liability.

Section 20 (Means Test to Determine Deductible)

The Bureau proposes to simplify the means test so that it better reflects the intent of the statute. The new method of applying for a zero or reduced deductible would require only a letter of explanation and financial documentation demonstrating inability to pay the first \$10,000 of the cost of an MSA.

Section 21 (Ownership and Disposition of Major Remediation Equipment)

The proposed changes to this section would allow the Bureau to:

A. lease, rather than purchase, major remediation equipment when leasing is more cost effective; and

B. remove major remediation equipment from the Department's reuse list if the cost of refurbishing such equipment to the manufacturer's operating specifications will exceed one-half the replacement cost.

Section 23 (Obtaining Facility and Owner Identification Numbers for Purposes of Corrective Action)

The Bureau proposes to add a new section that would create a mechanism for assigning owner identification and facility identification numbers to those owners and operators whose tanks are otherwise exempt from registration and tank fee requirements. Assigning owner and facility identification numbers will allow the Bureau to better track compliance and expenditures from the CAF.

Section 24 (Contents of Application for Payment at Responsible Party-Lead Sites) and Section 25 (Contents of Application for Payment at State-Lead Sites)

The Bureau proposes to divide 20.5.17.501 into two sections, one addressing the application requirements for responsible party-lead sites and the other addressing state-lead sites. The proposed rules would:

A. conform the rules to the Bureau's existing forms for consistency;

B. eliminate the burdensome requirement that owners, operators or contractors submit a signed affirmation sheet with each application for payment; rather a signed, dated, and notarized affirmation sheet would be required with only the first application for payment for each workplan; and

C. eliminate the limit on the number of applications for payment that may be submitted each quarter so that owners, operators and contractors are able to submit claims for payment as they are completed and the work is approved. This change will benefit owners, operators and contractors, as well as the Bureau, which will be able to maintain more accurate and timely information about expenditures from the CAF.

Section 26 (Application and Payment Process)

The proposed changes would:

A. require applications for payment to be received by the Bureau within 90 days of receiving the notice approving the deliverable;

B. require the Bureau to either pay or reject an application for payment within 60 days of receipt, as required by statute;

C. allow owners, operators and contractors to correct and resubmit rejected applications within 30 days; and

D. allow the Bureau to decline to review any application that has been rejected and resubmitted more than two times.

Section 27 (Subrogation)

The proposed change would require owners or operators to include copies of any insurance policies with their first application for payment, when insurance information is relevant, rather than with the MSA report.

Sections 28 through 30 (Administrative Review, Review of Determinations of Compliance, Request for Hearing on Determinations of Compliance)

The proposed changes to these sections would provide enhanced procedural due process by:

A. allowing contractors to seek review of adverse decisions, including adverse compliance determination decisions;

B. allowing offerors to seek administrative review of adverse contractor selection decisions;

C. allow individuals to seek administrative review of decisions not to designate a representative; and

D. applying the administrative review process in 20.5.10 NMAC to all NMED decisions (including cost eligibility determinations) made pursuant to Title 20, Chapter 5 NMAC, except compliance determinations (which shall continue to be administratively reviewed using the procedures in Part 17).

Section 32 (Contractor Fee Schedule)

The Bureau proposes to increase the amounts paid for work performed by contractors and for use of certain field equipment in order to better reflect current market values.

CONCLUSIONS

The proposed amendments to 20.5.17 NMAC aim to ensure the continued solvency and effectiveness of the Corrective Action Fund by:

- clarifying the process for determining compliance with the rules;
- improving the efficiency of claim processing;
- requiring the Department to follow established, transparent procedures in the choice of contractors;
- assuring that only qualified contractors perform corrective action work and that the CAF pays only for work that is satisfactorily performed; and
- ensuring that owners, operators, contractors and offerors are treated fairly by the Department through expanded access to administrative review procedures.