

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

**IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.5.1, 20.5.7, 20.5.10, 20.5.12 through 20.5.16 and 20.5.18,
PETROLEUM STORAGE TANK REGULATIONS**

No. EIB 08-___ (R)

PETITION FOR REGULATORY CHANGE

Pursuant to the Hazardous Waste Act, Section 74-4-1 et seq. NMSA 1978, the Ground Water Protection Act, Section 74-6B-1 et seq. NMSA 1978, the Environmental Improvement Act, Section 74-1-1 et seq. NMSA 1978, and the rules of the Environmental Improvement Board (the Board), 20.1.1 NMAC, the Petroleum Storage Tank Bureau (the Bureau) of the New Mexico Environment Department (the Department) respectfully requests a hearing before the Board on its proposed amendments to the New Mexico Petroleum Storage Tank rules, 20.5 NMAC. In particular, the Bureau proposes to amend the following: Part 1, General Provisions; Part 7, Reporting and Investigation of Suspected and Confirmed Releases; Part 10, Administrative Review; Part 12, Corrective Action for Storage Tank Systems Containing Petroleum Products; Part 13, Corrective Action for UST Systems Containing Other Regulated Substances; Part 14, Certification of Tank Installers; Part 15, Corrective Action Fund Use and Expenditures; Part 16, Qualification of Persons Performing Corrective Action; and Part 18, Operator Training.

Requirements imposed by the federal Energy Policy Act of 2005 (EPAAct) prompted the Bureau to begin revising its storage tank rules. Earlier this year, the Environmental Improvement Board adopted rules implementing some of EPAAct's requirements (in particular, rules concerning release prevention and secondary containment, among other things). To meet EPAAct's upcoming deadlines, the Bureau now respectfully asks the Board for a hearing in April to adopt the attached amendments and new rules. In addition to complying with EPAAct's requirements, particularly its operator training and certification requirements, the proposed rules also address other issues, including issues arising from the need to effectively manage and maintain the solvency of the Corrective Action Fund to the need to return properties to productive use to clarifying existing departmental procedures.

The rules with proposed amendments, as well as a Statement of Reasons for the proposed amendments, are attached to this Petition.

We respectfully request that the Board consider this Petition at its meeting on December 1, 2008, and set the proposed rules for hearing in April 2009, or as soon thereafter as is practical. Scheduling a hearing in April 2009 will allow for completion of the 2009 legislative session and for the 60-day notice to the public required by Section 74-1-9 NMSA 1978 and 20.1.1.301 NMAC.

The Bureau estimates that the hearing will take one full day, including approximately five hours of testimony in support of the proposed revisions from the Bureau, plus one hour of 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

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**PETROLEUM STORAGE TANK BUREAU'S
STATEMENT OF REASONS FOR PROPOSED AMENDMENTS TO
TITLE 20, CHAPTER 5 NMAC**

I. INTRODUCTION AND SUMMARY OF PROPOSED AMENDMENTS

The Petroleum Storage Tank Bureau (the Bureau) of the New Mexico Environment Department (the Department) proposes to amend the following Parts of Title 20, Chapter 5 NMAC: Part 1, General Provisions; Part 7, Reporting and Investigation of Suspected and Confirmed Releases; Part 10, Administrative Review; Part 12, Corrective Action for Storage Tank Systems Containing Petroleum Products; Part 13, Corrective Action for UST Systems Containing Other Regulated Substances; Part 14, Certification of Tank Installers; Part 15, Corrective Action Fund Use and Expenditures; Part 16, Qualification of Persons Performing Corrective Action; and Part 18, Operator Training.

Requirements imposed by the federal Energy Policy Act of 2005 (EPAAct) prompted the Bureau to begin revising its storage tank rules. Earlier this year, the Environmental Improvement Board adopted rules implementing some of EPAAct's requirements (in particular, rules concerning release detection and secondary containment, among other things). The attached rules will enable New Mexico to comply with another of EPAAct's provisions, its operator training and certification requirements. Note that some of the EPAAct's requirements (including delivery prohibition requirements) will require a legislative change before rules can be adopted and so are not addressed in these proposed amendments to the rules.

Once the Bureau began the process of reviewing the rules for compliance with federal law, it undertook a more comprehensive review of the rules. During the entire process of developing the proposed rules (from initial drafting through the revision process), the Bureau accepted and considered stakeholder comments. In an effort to encourage participation from all stakeholders, to gather comprehensive 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 and tribal representatives and members. The Bureau held stakeholder meetings in Santa Fe, Farmington, Roswell, and Albuquerque.

The rules proposed as a result of this review and consultation with Stakeholders will allow the Bureau to comply with federal law, improve the Bureau's ability to effectively manage and

maintain the solvency of the Corrective Action Fund, allow the Bureau to return properties contaminated by releases from petroleum storage tank systems to productive use, clarify existing departmental procedures, and alleviate certain administrative burdens for owners and operators. Stakeholders have demonstrated widespread support for the proposed revisions.

In order to avoid both duplication of the technical testimony that will be presented at the requested hearing and unnecessary repetition of the language of the extensive proposed amendments to the rules, the remainder of this Statement will group the proposed changes by part. 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 rules with the proposed amendments as re-numbered.

II. CHANGES COMMON TO MULTIPLE PARTS

The following proposed changes apply to all parts where they would be 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.

III. CHANGES PROPOSED TO PART 1: GENERAL PROVISIONS

In Part 1, the Bureau proposes to:

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

B. Incorporate definitions of general applicability from other parts, including “deductible”, “facility” and “incurred”.

C. Add definitions of three terms that are used throughout the rules as a result of new operator training and certification requirements (certified operator, rural and remote area, and un-manned facility).

IV. CHANGES PROPOSED TO PART 7: REPORTING AND INVESTIGATION OF SUSPECTED AND CONFIRMED RELEASES

The Bureau proposes the following changes to Part 7.

A. The Bureau proposes to add to all sections information in brackets on how to contact the Department to provide notification of a spill or release.

B. The Bureau proposes to move the method for determining whether a release is a confirmed release from 20.5.7.10 to 20.5.7.8 to ensure that owners and operators make this determination at the reporting stage.

C. The Bureau proposes to move the investigation of suspected release requirements from 20.5.7.703 to 20.5.7.9 to consolidate the rule requirements regarding suspected releases.

D. The changes to 20.5.7.8 would:

1. add the owner and operator's contact information and tank system description to the information required to be reported to enable the Department to more quickly and effectively respond to release reports;

2. capture new information on cause and source of releases as required by EPAct; and

3. incorporate a new reporting form to provide a more efficient reporting system.

E. The changes to 20.5.7.9 would emphasize that a monitoring result of anything other than a "pass" result must be reported to the Department to ensure compliance with this requirement elsewhere in the rule.

F. The changes to 20.5.7.10 would move the requirement that "visible leaks or seeps from any part of the storage tank system" be reported to the department to the first item of conditions to be reported to emphasize its importance.

V. CHANGES PROPOSED TO PART 10: ADMINISTRATIVE REVIEW

To ensure fairness in its processes, the Bureau proposes to expand access to administrative review processes by allowing:

A. Owners, operators and contractors to seek review of all Department determinations except compliance determinations.

B. Offerors to seek review of adverse contractor selection determinations.

C. Any person denied designation as a representative to seek review of that denial.

VI. CHANGES PROPOSED TO PART 12: CORRECTIVE ACTION FOR STORAGE TANK SYSTEMS CONTAINING PETROLEUM PRODUCTS

The Bureau proposes the following changes to Part 12.

A. The Bureau proposes to remove throughout the part references to the Guidelines for

Corrective Action, the Water Quality Control Commission (WQCC) variance procedure, the demonstration of technical infeasibility and the demonstration of equivalent protection. The Guidelines for Corrective Action are currently being revised and are not anticipated to be complete until late 2009, after these rules have become final. Upon completion, they will be used as optional rather than mandatory guidelines for owners and operators, as national guidelines or other local, state and federal laws and regulations govern the procedures currently covered by the Guidelines. The WQCC variance procedure, demonstration of technical infeasibility and the demonstration of equivalent protection are no longer used by the Bureau; instead, the Property Reuse determination proposed by the Bureau will better address the need to provide an alternative for certain sites contaminated by petroleum storage tank systems once the requisite conditions are met.

B. The Bureau proposes to add throughout the part requirements that owners and operators comply with all applicable federal, state and local laws, as noted above and as appropriate, where references to the Guidelines for Corrective Action have been removed.

C. The changes to 20.5.12.8 would:

1. require that owners and operators mark and secure major remediation equipment;
and

2. require that the Department notify owners, operators and contractors in writing when a completed deliverable is satisfactory to provide a benchmark for application for payment from the Corrective Action Fund.

D. For clarity, the changes to 20.5.12.16 would separate the requirements defining when a preliminary investigation is required (20.5.12.16) and the specific requirements for conducting the preliminary investigation (20.5.12.17).

E. The changes to 20.5.12.20, 20.5.12.22, 20.5.12.24 and 20.5.12.26 would change the time period in which the Department must report inadequacies in the secondary, tier one, tier two and tier three investigation reports from 90 days to “as soon as feasible” in order to provide the Department with the ability to thoroughly evaluate these reports.

F. The Bureau proposes to delete the subsections of 20.5.12.21, 20.5.12.23 and 20.5.12.25 regarding eligibility for a No Further Action (NFA) determination as the requirements for NFA have been clarified and consolidated in one section (20.5.12.44).

G. For clarity, the changes to 20.5.12.35 would separate the remediation plan

requirements into two sections, one for a conceptual remediation plan (20.5.12.35) and one for a final remediation plan (20.5.12.36).

H. The Bureau proposes to add requirements to 20.5.12.36 for information which must be submitted with a final remediation plan for excavation and disposal plans to distinguish this information from that which must be submitted with engineering plans.

I. The Bureau proposes to remove from Subsection A of 20.5.12.37 the time requirement in which the Department must review and approve a final remediation plan in order to provide the Department with the ability to thoroughly evaluate these plans.

J. The Bureau proposes to add a more detailed list to Subsection D of 20.5.12.38 of those items required in the “as-built” report following implementation of the final remediation plan to provide the Bureau with more comprehensive information about the remediation equipment in use in case of a failure or breakdown.

K. The Bureau proposes to add a new Property Reuse section (20.5.12.43) to provide a procedure to promote the redevelopment and productive use of sites contaminated by releases from petroleum storage tank systems. The Property Reuse determination would apply only to those sites with iron and manganese in groundwater about the WQCC standards and would document that remediation has been completed except for achievement of iron and manganese WQCC standards. A monitoring plan requirement for the owners and operators and the Bureau’s right to audit the use of the site are included in the section to ensure that the land use for which the determination is made has not changed.

L. The changes to 20.5.12.44 would:

1. clarify and consolidate the process for requesting a No Further Action (NFA) determination and conform it to the Property Reuse section procedures to the extent practicable; and

2. remove the demonstration of technical infeasibility and alternative abatement standard variances if the NFA conditions cannot be met, pursuant to the reasoning in Paragraph A, above, as Property Reuse provides a more practical and useful alternative for certain sites.

VII. CHANGES PROPOSED TO PART 13: CORRECTIVE ACTION FOR UST SYSTEMS CONTAINING OTHER REGULATED SUBSTANCES

The Bureau proposes the following changes to Part 13.

A. The Bureau proposes to remove throughout the part references to the Guidelines for

Corrective Action, the WQCC variance procedure, the demonstration of technical infeasibility and the demonstration of equivalent protection. The Guidelines for Corrective Action are currently being revised and are not anticipated to be complete until late 2009, after these rules have become final. Upon completion, they will be used as optional rather than mandatory guidelines for owners and operators, as national guidelines or other local, state and federal laws and regulations govern the procedures currently covered by the Guidelines. The WQCC variance procedure, demonstration of technical infeasibility and the demonstration of equivalent protection are no longer used by the Bureau; instead, the Property Reuse determination proposed by the Bureau will better address the need to provide an alternative for certain sites contaminated by releases from storage tank systems once the requisite conditions are met.

B. The Bureau proposes to add throughout the part requirements that owners and operators comply with all applicable federal, state and local laws, as noted above and as appropriate, where references to the Guidelines for Corrective Action have been removed.

C. The changes to 20.5.13.8 would:

1. require that owners and operators mark and secure major remediation equipment; and
2. require that the Department notify owners, operators and contractors in writing when a completed deliverable is satisfactory to provide a benchmark for application for payment from the Corrective Action Fund.

D. For clarity, the changes to 20.5.13.15 would separate the requirements defining when a preliminary investigation is required (20.5.13.15) and the specific requirements for conducting the preliminary investigation (20.5.13.16).

E. The changes to 20.5.13.17 and 20.5.13.19 would change the time period in which the Department must report inadequacies in the preliminary and secondary investigation reports from 90 days to “as soon as feasible” in order to provide the Department with the ability to thoroughly evaluate these reports.

F. For clarity, the changes to 20.5.13.27 would separate the remediation plan requirements into two sections, one for a conceptual remediation plan (20.5.13.27) and one for a final remediation plan (20.5.13.28).

G. The Bureau proposes to add requirements to 20.5.13.28 for information which must be submitted with a final remediation plan for excavation and disposal plans to distinguish this information from that which must be submitted with engineering plans.

H. The Bureau proposes to remove from Subsection A of 20.5.13.29 the time requirement in which the Department must review and approve a final remediation plan in order to provide the Department with the ability to thoroughly evaluate these plans.

I. The Bureau proposes to add a more detailed list to Subsection D of 20.5.13.30 of those items required in the “as-built” report following implementation of the final remediation plan to provide the Bureau with more comprehensive information about the remediation equipment in use in case of a failure or breakdown.

J. The Bureau proposes to add a new Property Reuse section (20.5.13.35) to provide a procedure to promote the redevelopment and productive use of sites contaminated by releases from storage tank systems. The Property Reuse determination would apply only to those sites with iron and manganese in groundwater about the WQCC standards and would document that remediation has been completed except for achievement of iron and manganese WQCC standards. A monitoring plan requirement for the owners and operators and the Bureau’s right to audit the use of the site are included in the section to ensure that the land use for which the determination is made has not changed.

K. The changes to 20.5.13.36 would:

1. clarify and consolidate the process for requesting a NFA determination and conform it to the Property Reuse section to the extent practicable; and
2. remove the demonstration of technical infeasibility and alternative abatement standard variances if the NFA conditions cannot be met, pursuant to the reasoning in Paragraph A, above, as Property Reuse provides a more practical and useful alternative for certain sites.

VIII. CHANGES PROPOSED TO PART 14: CERTIFICATION OF TANK INSTALLERS

In Part 14, the proposed changes would:

A. Eliminate the requirement that applicants for tank installer certification declare whether they owe child support in another state.

B. Require applicants for tank installer certification or renewal to pass a New Mexico Laws and Rules UST test administered by the Department, instead of a national test on New Mexico law because no national testing organization has a test that is as complete or up-to-date as one that will be developed and updated locally. The Department will offer the test at various locations around the state, rather than the single central location formerly offered by the national testing organization.

C. Require the Bureau to fail any tank installer applicant who has three significant errors during the on-site examination (for example, use of materials or installation practices that violate New Mexico regulations, manufacturer's installation instructions, or other industry standards) because such significant failures demonstrate that the applicant would be unable to install tanks in a safe manner.

D. Allow applicants to demonstrate required experience with work performed in other states, provided that applicants provide contact information of supervising regulators, to allow verification.

E. Delete the requirement that certified installers maintain certification from a national organization, which required passing a national installer exam every 2 years. Instead, the Department focuses attention on passing a 4-year test on New Mexico regulatory requirements.

IX. CHANGES PROPOSED TO PART 15: CORRECTIVE ACTION FUND USE AND EXPENDITURES

The Bureau proposes the following changes to Part 15.

A. The changes to 20.5.15.9 would add a provision requiring the Department to designate a site where the owner or operator is performing corrective action as a “responsible party-lead site”.

B. The changes to 20.5.15.10 would require the Department to investigate, ascertain and review information in order to make a determination either that an owner or operator is unknown, unable or unwilling to perform corrective action, or that a single entity is necessary to lead the corrective action. Additionally, 20.5.15.10 would provide a process by which the Department may designate the site as a state-lead site and take corrective action using the Corrective Action Fund.

C. The Bureau proposes to add a section (20.5.15.11) setting forth the procedure by which the Department notifies owners and operators that a site has been designated a state-lead site.

D. The changes to 20.5.15.12 would add a fourth priority site to the leaking storage tank ranking system to provide for prioritization of sites containing contaminants that were not released from the storage tank system.

X. CHANGES PROPOSED TO PART 16: QUALIFICATION OF PERSONS PERFORMING CORRECTIVE ACTION

The Bureau proposes the following changes to Part 16.

A. For clarity, the Bureau has added a definition of “proposal” to 20.5.16.7.

B. To ease the burden on owners, operators, contractors, and the Bureau, 20.5.16.9 would eliminate the requirement that a firm submit a current statement of qualifications for the firm's authorized representative if that information has already been submitted during the same phase of corrective action.

C. To address a rare, but time consuming and difficult administrative problem, 20.5.16.9 would allow the Department to require an already qualified firm to submit proof that it has paid its subcontractors, suppliers, labs, and other entities in a timely fashion if the Department reasonably believes that the firm is not making timely payments on work performed under an approved workplan.

D. To protect the Corrective Action Fund, the environment, public health and safety, and owners and operators, 20.5.16.10 would allow the Department to disqualify a firm from continuing to work on an approved workplan if the firm knowingly misrepresents material facts to the Department, does not comply with Parts 12, 13, 16 or 17 of New Mexico's regulations, does not complete work under an approved workplan to the Department's satisfaction, or fails to prove that it has timely paid its subcontractors, suppliers, labs and others, when required to do so by the Department.

E. To ensure fairness in any disqualification decision, 20.5.16.13 would allow a firm that has been denied qualification or that has been disqualified from performing corrective action to seek administrative review of that decision.

XI. PROPOSED NEW PART: OPERATOR TRAINING

In order to comply with the requirements of EPAAct, the Bureau has developed a new rule, Part 18: Operator Training. Part 18 would:

- A. Establish three classes of certified UST and AST operators (Classes A, B, and C).
- B. Set deadlines for initial certification and timelines for certification of new employees after the initial deadline.
- C. Establish the training and certification requirements for, as well as responsibilities and duties of, each class of certified operator.
- D. Require certified operators to be trained by trainers approved by the Department to ensure that certified operators are knowledgeable about New Mexico's laws and regulations.
- E. Establish retraining requirements, deadlines, and deferrals to ensure competence and safety without overly burdening storage tank facilities and their personnel.
- F. Establish standards for when each class of certified operator must be present at a facility.

G. Establish standards for approving trainers and training for certification of each class of operator.

H. Require certain documents and records to be maintained by trainers, owners, and operators, and to be made available to inspectors upon request.

CONCLUSIONS

The Environmental Improvement Board (the Board) is empowered to adopt rules “concerning storage tanks as may be necessary to protect public health and the environment.” Section 74-4-4(C) NMSA 1978. In so doing, the Board must consider “the character and degree of injury to or interference with the environment or public health” that the rules are intended to address and “the technical practicability and economic reasonableness of the [proposed] regulation.” Section 74-4-5(A) NMSA 1978. The changes proposed to the Petroleum Storage Tank rules are intended to better regulate both USTs and ASTs, as well as those who own, operate or otherwise work on those tank systems, in order to protect the public health, safety and welfare, and the environment by preventing releases of regulated substances, ensuring proper responses when releases occur, and protecting the solvency and continued viability of the Corrective Action Fund.

In drafting these proposed amendments to the rules, the Bureau has carefully balanced the burdens imposed on tank owners, operators, and contractors with the increased protection to the environment, particularly New Mexico’s groundwater, afforded by these amendments.