

**Environmental Quality, Environmental
Response and Remediation
R311-207
Accessing the Petroleum Storage Tank
Trust Fund for Leaking Petroleum
Storage Tanks**

NOTICE OF PROPOSED RULE

(Amendment)

DAR FILE NO.: 34274

FILED: 12/01/2010

RULE ANALYSIS

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: The reference to a Statement of Qualifications (SOQ) form for UST consultants is removed because no such form exists. Subsection R311-207-3(c) dealing with the requirements for the statement of qualification is reorganized to give a better description of the information that must be included in the SOQ, and to differentiate more clearly between the initial submittal of the SOQ and the yearly "renewal" submittal. The substance of the requirements does not change. Reference to Subsection 19-6-419(1)(b) of the UST Act is changed because the subsection referenced no longer exists. The rule subsection now refers to the more generic UST Act section reference (Section 19-6-419), which is adequate. The term "environmental consultant" is modified to be "consultant" because "environmental consultant" appears nowhere else in the rule and the term "consultant" is adequate. "Consultant" is defined in Subsection R311-200-1(b)(14). Rules for third party consultants are added to implement a change to the UST Act made by the 2010 Utah Legislature. The statutory change allows the Petroleum Storage Tank Fund to pay for consultants hired by third parties that have been affected by a release.

SUMMARY OF THE RULE OR CHANGE: Removes the reference to a Statement of Qualification form prepared by the Executive Secretary. Subsection R311-207-3(c) is reorganized. Modifies the reference to Subsection 19-6-419(1)(b) of the UST Act. Removes the term "environmental consultant" and replaces it with "consultant." Adds a section giving requirements for consultants that are hired by third parties.

STATUTORY OR CONSTITUTIONAL AUTHORIZATION FOR THIS RULE: Section 19-6-105 and Section 19-6-403 and Section 19-6-409 and Section 19-6-419

ANTICIPATED COST OR SAVINGS TO:

♦ **THE STATE BUDGET:** No cost or savings are anticipated. The changes are made to clarify the rule and implement changes made to the UST Act by the legislature.

♦ **LOCAL GOVERNMENTS:** No cost or savings are anticipated. The changes are made to clarify the rule and implement changes made to the UST Act by the legislature.

♦ **SMALL BUSINESSES:** A certified UST consultant who is not a licensed professional engineer (PE) or licensed professional geologist (PG) would be required to be licensed as a PE or PG in order to act as a third-party consultant and receive repayment of expenses according to the UST Act (Subsection 19-6-409(2)(e)). The cost to become licensed would be approximately \$300 for an individual who is otherwise qualified to become licensed. The aggregate cost would depend on the number of consultants who are currently not licensed as a PE or PG. Most consultants are currently licensed, so it is anticipated that the aggregate cost would be approximately \$3,000 or less.

♦ **PERSONS OTHER THAN SMALL BUSINESSES, BUSINESSES, OR LOCAL GOVERNMENTAL ENTITIES:** A certified UST consultant who is not a licensed professional engineer (PE) or licensed professional geologist (PG) would be required to be licensed as a PE or PG in order to act as a third-party consultant and receive repayment of expenses according to the UST Act (Subsection 19-6-409(2)(e)). The cost to become licensed would be approximately \$300 for an individual who is otherwise qualified to become licensed. The aggregate cost would depend on the number of consultants who are currently not licensed as a PE or PG. Most consultants are currently licensed, so it is anticipated that the aggregate cost would be approximately \$3,000 or less.

COMPLIANCE COSTS FOR AFFECTED PERSONS: The cost incurred by a certified UST consultant who would be required to become licensed as a PE or PG, approximately \$300.

COMMENTS BY THE DEPARTMENT HEAD ON THE FISCAL IMPACT THE RULE MAY HAVE ON BUSINESSES: Certified UST consultants may be required to be licensed as a PE or PG if they are not currently licensed in order to be hired as a third-party consultant under the change to the UST Act. The other rule changes are for accuracy and clarification of the rules.

THE FULL TEXT OF THIS RULE MAY BE INSPECTED, DURING REGULAR BUSINESS HOURS, AT:
ENVIRONMENTAL QUALITY
ENVIRONMENTAL RESPONSE AND
REMEDATION
ROOM FIRST FLOOR
195 N 1950 W
SALT LAKE CITY, UT 84116-3085
or at the Division of Administrative Rules.

DIRECT QUESTIONS REGARDING THIS RULE TO:

♦ Gary Astin by phone at 801-536-4103, by FAX at 801-359-8853, or by Internet E-mail at gastin@utah.gov

INTERESTED PERSONS MAY PRESENT THEIR VIEWS ON THIS RULE BY SUBMITTING WRITTEN COMMENTS NO LATER THAN AT 5:00 PM ON 01/14/2011

INTERESTED PERSONS MAY ATTEND A PUBLIC HEARING REGARDING THIS RULE:

♦ 01/06/2011 02:00 PM, MASOB, 195 N 1950 W, Room 1015, Salt Lake City, UT

THIS RULE MAY BECOME EFFECTIVE ON: 02/14/2011

AUTHORIZED BY: Brent Everett, Director

R311. Environmental Quality, Environmental Response and Remediation.

R311-207. Accessing the Petroleum Storage Tank Trust Fund for Leaking Petroleum Storage Tanks.

R311-207-3. Prerequisites for Submission of Requests for Reimbursement of Claims Against the Petroleum Storage Tank Trust Fund.

(a) Upon making a claim for coverage under the fund, and after receiving notice from the Executive Secretary that they are eligible to claim against the fund, the owner or operator shall respond to the compliance schedule issued by the Executive Secretary with work plans. The work plans may address three phases of the compliance schedule as determined by the Executive Secretary:

- (1) tasks required to bring the site under control;
- (2) tasks required to determine the extent and degree of the release; and
- (3) tasks required to remediate the site until the Executive Secretary is satisfied that remediation has achieved the clean up goals as described in Section R311-211 or until further remediation is not feasible as determined by the Executive Secretary.

(b) The work plan shall include a budget for the work. The budget shall be in compliance with R311-207-4(e)(1) and (2). The budget shall include proposed costs in an itemized format as described in Section R311-207-4(a).

(c) The ~~proposed~~ consultant must have a ~~an approved~~ Statement of Qualification approved by the Executive Secretary.

~~(1) The initial Statement of Qualification submittal shall include information about the qualifications of all proposed certified UST consultants or and other persons who will be performing investigation or corrective action activities concurrently in accordance with the work plans. The submission shall include information required by the Statement of Qualification form prepared by the Executive Secretary, and shall include at least three letters of reference from entities that have retained the services of the consultant. This Statement of Qualification must be updated annually and shall be approved by the Executive Secretary, for a period of one year. Letters of reference are not required to be resubmitted annually. The information submitted shall demonstrate that the following standards have been met, and shall document that:~~

~~(1)A) [F]the [proposed] consultant [shall be] and other key personnel are~~ of good character and reputation regarding such matters as control of costs, quality of work, ability to meet deadlines, and technical competence;

~~(2) The person directly overseeing the work must be a Certified UST Consultant in conformance with R311-201-2(a), R311-201-4(a) and R311-201-6(a) and;~~

~~)(3)B) [F]the consultant and other key personnel [must] have completed applicable Occupational Safety and Health Agency-approved safety training and any other applicable safety training, as required by federal and state law[-]; and~~

~~(4)C) [F]the consultant[must] carr[y]ies the following insurance:~~

~~(A)ii) Commercial General Liability Insurance or Comprehensive General Liability Insurance, including coverage for premises and operation, explosion, collapse and underground hazards, products and completed operations, contractual, personal injury and death, and catastrophic, with limits of \$1,000,000 minimum per occurrence, \$2,000,000 minimum general aggregate, and \$2,000,000 minimum products or completed operations aggregate;~~

~~(B)ii) Comprehensive Automobile Liability Insurance, with limits of \$1,000,000 minimum and \$2,000,000 aggregate; and~~

~~(E)iii) Workers' Compensation and Employers' Liability Insurance, as required by applicable state law.~~

~~(2) The Statement of Qualification shall be updated annually in January, and shall be approved by the Executive Secretary for a period of one year. The update shall include changes in personnel and current documentation of compliance with Subsections R311-207-3(c)(1)(B) and (C).~~

(d) The work plan shall include information about the responsible party's contract with any proposed consultant or other person performing remedial action ~~concurrently~~ in accordance with the work plans. That information shall demonstrate that the following requirements have been met, as determined by the Executive Secretary:

(1) The contract shall be with the consultant, and shall specify the certified UST consultant and other key personnel[-] for which qualifications are submitted under R311-207-3(c);

(2) The contract shall require a 100 percent payment bond through a United States Treasury-listed bonding company, or other equivalent assurance;

(3) The consultant shall have no cause of action against the state for payment;

(4) The contract will specify a subcontracting method consistent with the requirements of R311-207;

(5) The contract shall require, and include documentation that the consultant carries, the insurance specified in R311-207-3(c) ~~(5)1)(C).~~

(6) Payment under the contract shall be limited to amounts that are customary, legitimate, and reasonable;

(7) The contract shall include a provision indicating that the State of Utah is not a party to the contract, unless the State of Utah is a responsible party; and

(8) Any other requirements specified by the Executive Secretary.

(e) The work plan shall include any additional information required by 40 CFR 280.

(f) The Executive Secretary may waive specific requirements of Section R311-207 if he determines there is good cause for a waiver, and that public health and the environment will be protected. The Executive Secretary may also consider, in determining whether to grant a waiver, the extent to which the financial soundness of the fund will be affected.

(g) Once the responsible party's share of eligible costs has been spent in accordance with Section 19-6-419, the Executive Secretary shall review and approve or disapprove work plans and the corrective action plan and all associated budgets. For costs to be covered by the fund, the Executive Secretary must approve all work plans, corrective action plans, and associated budgets before a responsible party initiates any work, except as allowed by Sections 19-6-420(3)(b) and 19-6-420(6).

(h) A request for time and material reimbursement from the Fund must be received by the Executive Secretary within one year from the date the included work was performed or reimbursement shall be denied. If there are any deficiencies in the request, the owner/operator shall have 90 days from the date of their notification of the deficiency to correct the deficiency or the amount of the deficient item(s) shall not be reimbursed. If a release was initially denied eligibility and is subsequently found to be eligible, this provision shall apply only to the portion of work conducted following the determination that the release is eligible for reimbursement. The responsible party may submit claims for reimbursement where the work is more than one year old until April 2, 2003.

(i) The request for final reimbursement from the fund must be received by the Executive Secretary within one year from the date of the "No Further Action" letter issued by the Executive Secretary or reimbursement shall be denied. If a release is reopened as provided for in the "No Further Action" letter, payments from the fund may be resumed when approved by the Executive Secretary.

R311-207-4. Submission Requirements for Requests for Reimbursement of Claims Against the Petroleum Storage Tank Trust Fund.

(a) In order to receive payment from the fund, a claimant shall submit an invoice to the Executive Secretary. The invoice from the owner to the fund shall be on the form or forms provided by the Executive Secretary. Reimbursement may be on a pay for performance or on a time and material basis as approved in advance by the Executive Secretary. All costs for time and material reimbursement shall be itemized at a minimum to show the following:

- (1) amounts allocated to each approved work plan budget;
- (2) employee name, date of work, task or description of work, labor cost and the number of hours spent on each task;
- (3) sampling, reporting, and laboratory analysis costs;
- (4) equipment rental and materials;
- (5) utilities;
- (6) other direct costs; and
- (7) other items as determined by the Executive Secretary.

(b) All itemized expenses shall indicate the full name and address of the company or contractor providing materials or performing services.

(c) All expenses for time and material reimbursement shall be documented on a monthly basis, or as otherwise directed by the Executive Secretary, with a copy of the original bill provided to the Executive Secretary by the owners or operators. The claimant shall provide documentation that claimed costs and associated work were reasonable, customary, and legitimate in accordance with Sections R311-207-5 and R311-207-4(e).

(d) For time and material based reimbursement, before receiving payment under Section 19-6-419[(1)(b)], the responsible party shall provide proof of past payments for services or construction rendered, in a form acceptable to, or as directed by, the Executive Secretary, unless the Executive Secretary has agreed to other arrangements. The owner or operator shall remain primarily liable, however, for all costs incurred and should obtain lien releases from the company or contractor providing material or performing services.

(e) For time and material based reimbursement, documentation of expenses for construction or other services provided by a subcontractor retained by a [n-environmental] consultant or contractor shall include one or more of the following items:

(1) a minimum of three competitive bids by responsive bidders. To be competitive:

(A) Two of the bids must be from bidders who are not related parties. "Related parties" for the purpose of this rule, shall mean organizations or persons related to the consultant by any of the following: marriage; blood; one or more partners in common with the consultant; one or more directors or officers in common with the consultant; more than 10% common ownership direct or indirect with the consultant.

(B) The bid specifications shall contain a clear and accurate description of the technical requirements for the material, product or service and shall not contain features which unduly restrict competition. The bid specifications shall include a statement of the qualitative nature of the material, product or service to be procured, and, when necessary shall set forth those minimum essential characteristics.

(C) For frequently used services such as drilling, competitive bid schedules may be taken by the consultant once each calendar year in January with the results provided to the Executive Secretary. The prices from the lowest responsible bidder will be used for at least the following 12 months and will remain in effect until re-bid by the consultant and approved by the Executive Secretary. The Executive Secretary may reject bid prices that are not customary, reasonable and legitimate. The lowest bid from a responsible bidder will establish the maximum dollar amount the PST Fund will reimburse the owner for these services, regardless of whether the owner accepts that bid or another;

(2) sole source justification;

(A) Analytical laboratories may be justified based on service, data quality and cost;

(3) documentation that expenses have been for reasonable, customary, and legitimate purposes; or

(4) other documentation as required or requested by the Executive Secretary.

(f) In accordance with Section 19-6-420, the Executive Secretary may not authorize payment from the fund for services provided by consultants, contractors, or subcontractors which are in non-compliance with the requirements of Section R311-207 or any other applicable federal, state, or local law.

(g) Any third party claims brought against the owner or operator or any occurrence likely to result in third party claims against the owner or operators as a result of the release must be immediately reported to the State Risk Manager and to the Executive Secretary.