

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Petroleum UST Release Compensation Board

Regulation/Package Title: OAC Chapter 3737 Five-year Review – No Change Rules

Rule Number(s): 3737-1-04.1, 3737-1-05, 3737-1-06, 3737-1-07, 3737-1-10, 3737-1-11, 3737-1-13 and 3737-1-15

Date: July 2, 2014

Rule Type:

- New
 Amended

- 5-Year Review
 Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

In accordance with the five-year rule review requirement of section 119.032 of the Revised Code, the Petroleum Underground Storage Tank Release Compensation Board ("Board"), with significant participation and input from industry representatives, agency stakeholders, agency staff, and the Assistant Attorney General assigned to the Board reviewed each of the Board's rules, and as a result of this review, the Board is proposing no changes to the following rules:

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Rule 3737-1-04.1 Coverage reinstatement.

The rule provides the requirements for reinstating coverage with the Financial Assurance Fund (“Fund”) when a responsible person, i.e. an owner or operator, has not received a certificate of coverage for an underground storage tank for the prior two or more consecutive fiscal years.

Rule 3737-1-05 Supplemental petroleum underground storage tank financial assurance fee.

The rule provides for the assessment of a supplemental fee in the event the unobligated balance of the Fund does not meet the statutory financial soundness objective set forth in division (C) of section 3737.91 of the Revised Code. If a responsible person fails to timely pay any supplemental fee assessed by the Board, the certificate of coverage currently in effect is revoked.

Rule 3737-1-06 The deductible and reduced deductible.

This rule describes the standard and reduced deductible amounts of Fund coverage. It establishes the qualification for a responsible person to obtain coverage at the reduced deductible, and it sets the additional per-tank fee amount for obtaining Fund coverage with a reduced deductible.

Rule 3737-1-07 Establishing fund eligibility for corrective action costs.

This rule provides the requirements for obtaining eligibility to file claims under the Fund. In addition, after a responsible person is determined to be eligible, the rule requires the responsible person to maintain eligibility by maintaining compliance with underground storage tank regulations. If the responsible person fails to maintain compliance with the underground storage tank regulations, eligibility to file claims under the Fund may be revoked.

Rule 3737-1-10 Financial audits.

This rule authorizes the Fund’s director to perform financial audits to ensure compliance with the Board’s rules and to certify that corrective action costs submitted for reimbursement are eligible for reimbursement.

Rule 3737-1-11 Technical audits.

This rule authorizes the Fund’s director to conduct technical audits during the review of applications for reimbursement to ensure compliance with the Board’s rules and to verify that the work performed was necessary for corrective actions.

Rule 3737-1-13 Reimbursement application review.

This rule requires the director or director’s designee to review the reimbursement application and provides for notification to the responsible person of any errors or omissions. The rule establishes when additional information may be requested and sets forth deadlines for submitting the additional information.

Rule 3737-1-15 Modifying the deductible or the reduced deductible.

The rule provides for the modification of the deductible and reduced deductible if necessary to ensure the solvency of the Fund and to meet the financial soundness objectives set forth in division (C) of section 3737.91 of the Revised Code.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Section 3737.90 of the Revised Code authorizes the Board to adopt, amend and rescind rules.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

While chapter 3737 of the Ohio Administrative Code is not a regulation, the Board and the Fund it manages were created to satisfy federal EPA regulations requiring all U.S. petroleum underground storage tank owners to demonstrate \$1 million of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases from petroleum underground storage tank systems [40 CFR Part 280, Subpart H].

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not Applicable.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The Fund serves three vitally important public functions. First, the Fund provides an affordable mechanism necessary to fulfill the federal regulation that requires all petroleum underground storage tank owners and operators to demonstrate financial responsibility of \$1 million for corrective action costs and compensation to be paid to a third party for bodily injury or property damage resulting from an accidental release of petroleum from their underground storage tank systems. Second, it protects Ohio's businesses and individuals from financial insolvency by reimbursing responsible persons for the costs incurred to investigate and remediate any releases as well as to compensate affected third-parties. Lastly, it serves to protect the welfare of the general public through the protection of Ohio's land and water resources, thereby reducing the health risks associated with petroleum releases.

Since the Fund was established by the Ohio General Assembly in 1989, the Fund has proven to be a viable financial assurance mechanism for Ohio's petroleum tank owners. To date, more than \$220 million has been reimbursed to Ohio's tank owners and operators to clean up more than 2,922 petroleum contaminated sites.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

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Success of these rules will be measured by the overall effectiveness and efficiency of the agency's mission of providing financial assistance to remediate contamination caused by releases from assured petroleum underground storage tanks.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The Board's Rules Committee holds open meetings throughout the rule review year. The Committee consists of Board Chair, James Rocco, representing petroleum refiners; Vice-Chair John Hull, representing engineers with geology experience and not associated with the petroleum industry; Cheryl Hilvert, representing local government; Don Kuchta, representing petroleum dealers; and Chris Geyer, representing the Ohio EPA. The committee met on February 19, 2014; March 20, 2014; May 8, 2014; and June 16, 2014.

Agency stakeholders were notified of the Rules Committee meetings by email on January 22, 2014; February 20, 2014; April 16, 2014; and May 21, 2014. A list of the Board's stakeholders that were contacted is attached as Exhibit A. Meeting notices were also published on the Board's website, posted at the Board's office and sent to Gongwer News Service. Stakeholders were also encouraged to provide comments on the rules by emailing rules@petroboard.org.

The following stakeholders were in attendance at one or more of the Rules Committee meetings: William Hills, representing the Ohio Department of Commerce, State Fire Marshal, Bureau of Underground Storage Tank Regulations (BUSTR); Ryan Sabol and Will Latt, representing Speedway, LLC; Dan Adams and Doug Darrah, representing Cardno ATC; Brent McPherson, representing BJAAM Environmental, Inc.; Brian Mead, representing the County Commissioners Association of Ohio; and Robert Eshenbaugh, representing API Ohio.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

The Board's Rules Committee, agency stakeholders, agency staff, and the Assistant Attorney General assigned to the Board met to review each of the Board's rules as part of the five-year rule review process. After discussing these specific rules, the consensus was that these rules in their current state serve an important function for the agency and are integral and necessary for the successful management of the Fund, and therefore, should not be altered.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

Not Applicable.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

No comments concerning alternatives to these rules were received and no alternatives to these rules in their current form were considered.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

Not Applicable.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The Board is the only State of Ohio agency that exists to provide Ohio's petroleum underground storage tank owners and operators with \$1 million of financial responsibility to pay for potential damages caused by releases from their underground storage tank systems.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Board notifies Ohio's petroleum underground storage tank owners and operators and agency stakeholders of its rule filings through a biannual newsletter and its website. In addition, agency correspondence is written to clearly explain the requirements of the Board's rules to the reader. Constituents are encouraged to contact the Board's office to discuss any questions or concerns regarding the Board's rules with trained agency personnel.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**
The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.

The rules adopted by the Board apply to all of Ohio's past and present petroleum underground storage tank owners and operators. Currently there are approximately 2,800 private owners of

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19,000 underground storage tanks; an additional 1,750 tanks are owned and operated by public entities.

Rule 3737-1-04.1

- a. Rule 3737-1-04.1 only impacts tank owners and operators who have not obtained a certificate of coverage for a given underground storage tank for two or more consecutive fiscal years.
- b. In order to comply with rule 3737-1-04.1, any responsible person subject to the rule is required to submit an affidavit certifying that there has been no release or suspected release required to be reported to the fire marshal or that any known release is in compliance with the corrective action requirements of rule 1301:7-9-13. The tank owner must also provide documentation demonstrating compliance with the fire marshal's rules for the operation and maintenance of petroleum underground storage tanks. Such documentation may include, but is not limited to, copies of release detection records, results of tank and line tightness tests, and if applicable, results of corrosion protection tests and out-of-service permits.
- c. If a responsible person is subject to the requirements of rule 3737-1-04.1, a single-page affidavit is required to be signed and notarized in order to comply with the certification requirement of the rule. If the responsible person is operating the tank system in compliance with the fire marshal's rules, the records required to comply with the rule should be readily available to the responsible person and can be faxed, emailed or mailed to the Board. Owners who are not in compliance with the fire marshal's rules may need to work with the fire marshal's office to bring the tank system into compliance before the documentation necessary to comply with the rule can be provided.

Rule 3737-1-05

- a. If assessed, the supplemental fee would impact all owners and operators of underground storage tanks in Ohio at the time of the assessment.
- b. Rule 3737-1-05 arguably may be adverse to businesses, because if implemented, would require expenditures as a condition of compliance.
- c. If the Board determines a supplemental fee is necessary to meet the statutory objective of financial soundness set forth in division (C) of section 3737.91 of the Revised Code, responsible persons must remit a supplemental fee to comply with the rule. Since the creation of the Fund in 1989, the Board has not found it necessary to implement a supplemental fee. Further, based on the Fund's five-year financial projections, the assessment of a supplemental fee is not anticipated.

Rule 3737-1-06

- a. Rule 3737-1-06 impacts all of Ohio's tank owners and operators.

- b. The deductible and reduced deductible amounts are set forth in the rule. No reimbursement from the Fund for the costs of corrective action or compensation to third parties for bodily injury or property damage can occur until the responsible person has incurred costs that exceed the applicable deductible. Costs applied to the deductible amount are not reimbursable from the Fund. In addition, responsible persons that choose to obtain a reduced deductible will incur an additional annual per-tank fee. Under division (F) of section 3737.91 of the Revised Code, only responsible persons owning, or owning or operating, a total of six or fewer underground storage tanks may elect and obtain coverage at the reduced deductible.
- c. The rule applies a deductible of \$55,000 for responsible persons electing coverage at the standard deductible, and \$11,000 for responsible persons electing coverage at the reduced deductible. This deductible is applied for each petroleum release for which the responsible person seeks reimbursement from the Fund. Responsible persons who qualify for Fund coverage at the reduced deductible amount may elect it by paying an additional \$200 per tank for each year in which the reduced deductible is chosen.

Rule 3737-1-07

- a. Rule 3737-1-07 impacts only responsible persons who are seeking reimbursement for corrective action costs from the Fund.
- b. The rule requires information to be provided to the Board in order to comply with the rule.
- c. The Application for Financial Assurance Fund Eligibility required by the rule is a four-page application that can be completed by the responsible person or at the responsible person's option, an environmental consultant. In addition, a report describing the petroleum release (closure report, site assessment report, immediate corrective actions report, etc.) must be submitted with the application. Because these reports are required by the fire marshal's closure assessment or corrective action rules, the only additional expenditures to the applicant are duplicating and mailing costs.

Rule 3737-1-10

- a. Rule 3737-1-10 only impacts certain responsible persons who are seeking reimbursement for corrective action costs from the Fund.
- b. The rule requires responsible persons to provide information to the Board in order to comply with the rule.
- c. This rule authorizes the Fund's director to perform financial audits to ensure compliance with the Board's rules and to certify that corrective action costs submitted for reimbursement are eligible for reimbursement. As part of the audit, the responsible person may be required to submit additional information and documentation to support the claimed costs. The time required will vary depending upon the extent of the requested information. However, it is

estimated that less than six hours of the responsible person's time would be required to prepare a response.

Rule 3737-1-11

- a. Rule 3737-1-11 only impacts certain responsible persons who are seeking reimbursement for corrective action costs from the Fund.
- b. The rule requires responsible persons to provide information to the Board in order to comply with the rule.
- c. This rule authorizes the Fund's director to conduct technical audits during the review of applications for reimbursement to ensure compliance with the Board's rules and to determine that the work performed was necessary for corrective actions. As part of the audit, the responsible person may be required to submit additional information and documentation explaining and justifying the work for which costs were claimed for reimbursement. The time required will vary depending upon the extent of the requested information. However, it is estimated that less than six hours of the responsible person's and / or environmental consultant's time would be required to prepare a response.

Rule 3737-1-13

- a. Rule 3737-1-13 only impacts certain responsible persons who are seeking reimbursement for corrective action costs from the Fund.
- b. The rule requires responsible persons to provide information to the Board when requested. To comply with the rule, a claim applicant, i.e. a responsible person, must submit missing documentation or information necessary to complete the Claim Reimbursement Application within 90 days of being requested. This rule arguably could adversely impact a business if it fails to timely provide the requested information because any costs that remain undocumented after the 90-day response period cannot be reimbursed by the Fund.
- c. In order to comply with the rule, the responsible person may be required to provide records, documents, and explanations of costs that are necessary to fully complete the Claim Reimbursement Application. Examples of additional information that may be required include any missing portions of the Claim Reimbursement Application, such as invoices and proof of payment documentation; environmental reports and other technical information pertaining to the cleanup; and copies of relevant correspondence received from or issued to the State Fire Marshal's Bureau of Underground Storage Tank Regulations. The amount of time and money necessary to correct errors and omissions on the Claim Reimbursement Application depends solely on the number of problems identified during the review of the applicant's claim. The responsible person may submit most requested information by email, fax or mail; lengthy reports must be submitted in hard copy form.

Rule 3737-1-15

- a. Rule 3737-1-15 impacts all of Ohio's tank owners and operators.

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- b. The rule provides the Board with the ability to modify the standard deductible and reduced deductible amounts set forth in rule 3737-1-06. This rule arguably could adversely affect a business if the Board determines an increase to the deductible amounts is necessary to meet the financial soundness objectives set forth in section 3737.91 of the Revised Code.
- c. An increase in the deductible and reduced deductible amounts could result in an increase in expenditures for the responsible person if a petroleum release is discovered after the deductible amounts are increased and the corrective action costs exceed the deductible. If the deductible amounts are reduced however, the corrective action costs the responsible person must incur before Fund reimbursement is available would decrease.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The Rules Committee members, industry representatives, constituent stakeholders and agency staff recognize that these rules could arguably adversely impact the business community, specifically Ohio's tank owners and operators. However, the rules are necessary to implement sections 3737.90, 3737.91 and 3737.92 of the Revised Code, and they are essential tools that ensure the long-term financial health and continued success of the Fund. Any potential adverse impacts that result from these rules are offset by the benefit to Ohio's tank owner community as a whole.

Rule 3737-1-04.1

Where a certificate of coverage has not been issued for a given petroleum underground storage tank for two or more consecutive prior fiscal years, rule 3737-1-04.1 requires the responsible person to submit documentation demonstrating compliance with the fire marshal's rules for the operation and maintenance of the subject underground storage tank before a certificate may be issued. This rule provides a responsible person with notice of non-assurability with the Fund before the responsible person experiences a release and upon application for eligibility pursuant to rule 3737-1-07, is denied eligibility to claim under the Fund. By verifying the responsible persons compliance with the fire marshal's rules prior to the discovery of a release, the responsible person is provided with advance notice and afforded the opportunity to correct any issues of non-compliance. The rule has been very successful in assisting Ohio's owners and operators with getting into compliance with the rules governing the operation of their underground storage tanks and in ensuring the responsible person is in compliance with those rules at the time a release is discovered.

Rule 3737-1-05

Rule 3737-1-05 requires the responsible person to remit a supplemental fee in the event the unobligated balance in the Fund is less than \$15 million. This fee is necessary to meet the financial soundness objectives set forth in section 3737.91 of the Revised Code and ensures that a funding source will be available to Ohio's tank owners and operators to underwrite the

costs necessary to remediate the environment and pay for third-party bodily injury or property damage in the event of a petroleum release.

Rule 3737-1-07

Rule 3737-1-07 requires the responsible person to file an eligibility application in order to receive a determination of eligibility to file claims under the Fund for corrective action costs resulting from an accidental release of petroleum. This rule serves to ensure that only an eligible responsible person may seek reimbursement and receive monies from the Fund. The rule requires the director of the Fund to verify that at the time the release was first suspected or confirmed, the responsible person possessed a valid certificate of coverage for the tank from which the release occurred, the subject tank was being operated and maintained in compliance with the fire marshal rules, and the release was timely reported as required by the fire marshal rules.

Rules 3737-1-10, 3737-1-11 and 3737-1-13

Rules 3737-1-10, 3737-1-11 and 3737-1-13 require a responsible person that has experienced a petroleum release to file complete claim applications and to document in both technical and financial terms the work for which reimbursement from the Fund is being sought. These rules help to ensure that only those actual costs that are reasonable and necessary for corrective action are reimbursed by the Fund.

Rules 3737-1-06 and 3737-1-15

Increasing or decreasing the deductible amount of coverage with the Fund is one mechanism available to the Board to ensure the continued financial solvency of the Fund as well as ensuring that the annual per-tank fee remains affordable to Ohio's petroleum underground storage tank owners and operators. The deductibles encourage tank owners and operators to operate and maintain their underground storage tanks and related equipment in a manner that reduces the likelihood of a release. Further, when a release does occur, it is to the responsible person's benefit to stay involved in and oversee the corrective action activities in order to control the costs to both the responsible person and the Fund.

Note: Because no changes are being proposed to these rules, the Board does not estimate an increased cost to the business community to comply with the rules in their current state.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

In Ohio, as in many other states, the only mechanism available to petroleum underground storage tank owners and operators to demonstrate \$1 million of financial responsibility for taking corrective actions and compensating third parties as required by both federal and state law is the Financial Assurance Fund.

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17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

There are no administrative fines or civil penalties associated with these rules.

18. What resources are available to assist small businesses with compliance of the regulation?

The Board's staff is available during customer service hours to answer questions tank owners and operators may have concerning the Board's rules. In addition, information is published on the Board's website and presented in its biannual newsletter.

Contact Information:

Petroleum Underground Storage Tank Release Compensation Board

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