Office of the Registrar of Regulations,
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DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

DIVISION OF AIR AND WASTE MANAGEMENT

TANK MANAGEMENT BRANCH

Statutory Authority: 7 Delaware Code, Chapters 60 and 74 (7 **Del.C.** Ch. 60 & 74)
7 **DE Admin. Code** 1351

PROPOSED

SAN # 2008-20 and 2008-23

1351 Regulations Governing Underground Storage Tank Systems

PART H: Regulations Governing Reimbursement For Petroleum Contamination Site Cleanup

1.0 Introduction and Scope of the Early Compliance and Detection Incentive Program

1.1 General Provisions

1.1.1 ~~Title~~ 7 **Del.C.** §7417 provides that, in order to encourage voluntary and expeditious clean up of contaminated sites related to the storage of petroleum or petroleum products, any person responsible for conducting site cleanup may be entitled to reimbursement from the Delaware Underground Petroleum Storage Tank Response Fund. Reimbursement for all or a portion of allowable costs defined in 7 **Del.C**. §7409 incurred on or after July 16, 1987 in connection with site clean up will be made at a reasonable rate.

1.1.2 This Part shall apply to requests for reimbursement of costs integral to clean up of sites eligible for participation in the reimbursement program established by 7 **Del.C.** §§7409 and 7417, where the contamination is related to the storage of petroleum or petroleum products.

1.1.3 This Part establishes procedures and documentation required to receive reimbursement.

1.1.4 Records relating to site clean up which were generated prior to ~~the effective date of these Regulations~~ July 11, 1986 shall, to the maximum extent practicable, be assembled in accordance with §11 of this Part.

1.1.5 The requirements contained in this Part shall apply only to those facilities with petroleum UST System as defined in Part A, §2 of these Regulations.

1.1.6 This Part of the Regulations applies to all applicants who applied for the Early Compliance and Detection Incentive (ECDI) Program.

2.0 Definitions

All words and phrases defined in 7 **Del.C.** §7402 shall have the same meaning when used in these Regulations unless otherwise set forth in this Part unless the context clearly indicates otherwise. The following words, terms and phrases, when used in this Part shall have the meaning ascribed to them in this Section, except where the context clearly indicates a different meaning.

"**Assignment**" means the scheduling of reimbursement for Corrective Action or for payment of reimbursable expenses.

"**Capital Expense Item**" means equipment, fixtures, and other tangible personal property of a non consumable and non expendable nature, the value or cost of which is $1 thousand ($1000) or more and the normal expected life of which is one year or more.

"**Cleanup, Rehabilitation or Action**" means those activities necessary to meet the requirements of an approved Remedial Action work plan.

"**Corrective Action Task**" means a phase of site clean up, including all Corrective Action tasks including initial investigation and Remedial Action as described in Part E of these Regulations.

"**ECDI Program**" means Early Compliance and Detection Incentive Program.

"**Obligate, Obligated or Obligation**" means a charge, based on best department cost estimate, against the un obligated balance in the fund made in accordance with the requirements of ~~Title~~ 7, **Del.C.** §§7409 and 7417.

"**Reimbursement**" means the payment of money to a qualified recipient from obligated funds.

3.0 Reimbursement Costs Eligibility

3.1 Eligible Costs

3.1.1 Disbursements from the fund shall be made only for the following costs:

3.1.1.1 Costs incurred in investigation and assessment of an eligible site under this Part.

3.1.1.2 Costs associated with restoration or replacement of potable water supplies.

3.1.1.3 Costs incurred in taking immediate Corrective Action to contain or mitigate the effects of any Release of petroleum into the environment from an UST System if such action is necessary, in the judgment of the Department to protect human health, safety, welfare, or the environment.

3.1.1.4 Costs associated with maintenance and monitoring of contaminated sites.

3.1.1.5 Costs incurred in inspection and supervision of cleanup activities.

3.1.1.6 The "cost share" of Corrective Action with respect to any release of petroleum into the environment from Underground Storage Tank Systems undertaken under a cooperative agreement with the Administrator of the United States Environmental Protection Agency, as determined by the Administrator of the United States Environmental Protection Agency S. 9003 (h) (7) (B) of the United States Public Law 98 616 (as amended in 1986 by United States Public Law 99 662).

3.2 Ineligible Costs

3.2.1 Nothing in this Part must be construed to authorize reimbursement for costs incurred before July 16, 1987.

3.2.2 Nothing in this Part must be construed to authorize reimbursement for costs associated with the following:

3.2.2.1 Achieving compliance with the provisions of the Delaware Regulations Governing Underground Storage Tank Systems with the exception of the eligible costs outlined in §3.1 of this Part;

3.2.2.2 Interest or carrying charges of any kind;

3.2.2.3 Insurance premiums other than specific policies or bonds required for site rehabilitation;

3.2.2.4 Contamination assessments performed in conjunction with property acquisition where no contamination is discovered;

3.2.2.5 Site clean up costs which are determined to be not reimbursable as a result of an audit performed pursuant to §5 of this Part;

3.2.2.6 Costs relating to post cleanup activities, including preparation of reimbursement applications or keeping and compiling records of costs related to site clean up.

3.2.3 Nothing in this Part must be construed to authorize reimbursement for costs incurred solely in cleaning up non petroleum or non petroleum product contamination.

3.2.4 Nothing in this Part must be construed to authorize reimbursement for costs incurred solely in cleaning up petroleum or petroleum product contamination which is not related to the underground storage of those substances.

3.2.5 Nothing in this Part must be construed to authorize reimbursement for costs of site clean up unless cleanup tasks are completed in accordance with requirements by the Department.

3.2.6 Nothing in this Part must be construed to authorize reimbursement for costs of site clean up for a release for which the responsible party failed to comply with the enforcement action initiated by the Department in accordance with 7 **Del.C.** §7411.

4.0 Conditions of Participation

4.1 Eligibility Conditions

4.1.1 Participation in the reimbursement program shall be subject to the following conditions:

4.1.1.1 The first twenty-five hundred dollars ($2,500) in costs per site as described in §3 of this Part will not be reimbursed by the fund.

4.1.1.2 The facility owner must not be the Federal Government or any agency or subdivision thereof.

4.1.1.3 Contamination of the site is as a result of normal aging and/or corrosion, and is not as a result of intentional damage, or improper handling or installation.

4.1.1.4 Contamination of the site is as a result of a release from an ~~u~~Underground Storage ~~t~~Tank containing ~~p~~Petroleum or ~~h~~Heating ~~f~~Fuel.

4.1.1.5 Reimbursement for site clean up either through a person's own personnel or through responsible corrective action contractors or subcontractors shall not be considered a State contract or subject to State bid requirements.

4.1.1.6 Site rehabilitation must be completed in accordance with requirements established by the Department.

4.1.1.7 Nothing in this Section must be construed to authorize any payments for the ~~r~~Repair, replacement, ~~r~~Retrofit, ~~u~~Upgrade, Removal or Closure in Place of any UST System.

4.1.1.8 The release did not result from any gross negligence, including, but not limited to the following:

4.1.1.8.1 Willful intent to conceal existence of a serious discharge; or

4.1.1.8.2 Falsified inventory or reconciliation records; or

4.1.1.8.3 Intentional damage to an UST System; or

4.1.1.8.4 Willful failure to perform the inventory and reconciliation of records required in the Delaware Regulations Governing Underground Storage Tank Systems; or

4.1.1.8.5 Failure to meet the ~~r~~Retrofitting or ~~u~~Upgrading requirements of the Delaware Regulations Governing Underground Storage Tank Systems; or

4.1.1.8.6 Willful failure to comply with the Release Detection requirements Delaware Regulations Governing Underground Storage Tank Systems; or

4.1.1.8.7 Violation of any of the requirements of the Delaware Regulations Governing Underground Storage Tank Systems.

5.0 Audit

5.1 Financial Audit

5.1.1 The Department will perform financial audits as necessary to ensure compliance with these Regulations and to certify site rehabilitation costs.

5.1.2 Prior to any financial audit, the Department will give the person conducting site clean up reasonable notice of the proposed audit.

5.1.3 The Department will provide a written report on each audit by hand delivery or certified mail to the person responsible for conducting site clean up. The person responsible for conducting site clean up must respond, in writing, to the findings and recommendations of the report within thirty (30) days of the receipt of the report.

5.2 Technical Audit

5.2.1 Technical audits may be performed during review of the complete application to determine if the work performed was substantially in excess of that necessary to meet the requirements of any Remedial Action Work Plan approved by the Department.

5.2.2 Additional technical audits will be performed as necessary to insure compliance with applicable rules and to verify site clean up activities.

5.2.3 The Department will provide a written report on each technical audit by hand delivery or by certified mail to the person responsible for conducting site remediation. The person responsible for conducting site clean up must respond, in writing, to the findings and recommendations of the

report within thirty (30) days of receipt of the report. A final determination of the acceptability of questioned corrective and remedial activities will be made by the Department.

6.0 Limitations

6.1 General Limitations

6.1.1. Nothing in this Part must be construed to authorize reimbursement for costs incurred before July 16, 1987.

6.1.2. Nothing in this Part must be construed to authorize reimbursement for costs associated with the following:

6.1.2.1 Achieving compliance with the provisions of Delaware's Regulations Governing Underground Storage Tank Systems with the exception of the eligible costs outlined in §3 of this Part.

6.1.2.2 Interest or carrying charges of any kind.

6.1.2.3 Insurance premiums other than specific policies or bonds required for site rehabilitation.

6.1.2.4 Contamination assessments performed in conjunction with property acquisition where no contamination is discovered.

6.1.2.5 Site clean up costs which are determined to be not reimbursable as a result of an audit performed pursuant to §5 of this Part.

6.1.2.6 Costs relating to post cleanup activities, including preparation of reimbursement applications or keeping and compiling records of costs related to site clean up.

6.1.3 Nothing in this Part must be construed to authorize reimbursement for costs incurred solely in cleaning up non petroleum or non petroleum product contamination.

6.1.4 Nothing in this Part must be construed to authorize reimbursement for costs incurred solely in cleaning up petroleum or petroleum product contamination which is not related to the underground storage of those substances.

6.1.5 Nothing in this Part must be construed to authorize reimbursement for costs of site clean up unless cleanup tasks are completed in accordance with requirements by the Department.

6.1.6 Nothing in this Part must be construed to authorize reimbursement for costs of site clean up for a release for which the responsible party failed to comply with the enforcement action initiated by the Department in accordance with 7 **Del.C.** §7411.

7.0 Site Reimbursement Eligibility Finding

7.1 Eligibility Finding Requirements

7.1.1 Upon receipt of an application for consideration of eligibility for reimbursement for petroleum and heating fuel contamination Corrective Action, the Department will conduct a site inspection and review applicable records to determine whether the site is eligible for reimbursement.

7.1.2 The site inspection and record review will be conducted in such a manner as to determine whether the conditions established under §4 of this Part have been met.

7.1.3 Upon completion of the inspection, the Department will prepare a Site Reimbursement Eligibility Finding and provide a copy of the finding by hand delivery or certified mail to the applicant.

7.1.4 In the event that the Department determines the site is not eligible for reimbursement, the finding must include specific reference to the eligibility conditions which were not met. The applicant must respond, in writing, to the finding within thirty (30) days of the receipt of finding. A final determination of eligibility for reimbursement must be made by the Department.

8.0 Site Prioritization

8.1 Site Prioritization Requirements

8.1.1 The Department will prioritize all eligible petroleum contamination sites based on factors that include, but are not limited to:

8.1.1.1 The degree to which human health, safety, or welfare may be affected by exposure to the contamination; and

8.1.1.2 The present and future uses of the affected aquifer or surface waters, with particular consideration as to the probability that the contamination is substantially affecting, or will migrate to and substantially affect, a known public or private source of potable water; and

8.1.1.3 The size of the population or area affected by the contamination;

8.1.1.4 The effect of the contamination on the environment.

8.1.2 The priority list of sites will be based on an ordering of scored sites such that the highest scored site(s) will be of highest priority for response action or payment of reimbursable expenses and the lowest scored site(s) will be of lowest priority for response action or payment of reimbursable expenses.

8.1.3 The Department may adjust the Priority List if it determines that a more cost effective approach can be achieved by a reassignment or that a compelling public health or environmental condition warrants a reassignment or that reassignment is otherwise in the overall public interest.

8.1.4 Regardless of the position of a site on the priority list, the Department may initiate emergency action for those sites that, in the judgment of the Department, are an imminent hazard to human health and safety or where failure to prevent migration of petroleum or contamination would cause irreversible damage to the environment.

8.1.5 The Department will develop the list of sites prioritized for the purpose of reimbursement. The list will be made available to participants of the ECDI program upon request.

9.0 Cost and Completion Schedule Form

9.1 Cost and Completion Schedule Form Requirements

9.1.1 The cost and completion schedule estimates provided will be used by the Department to obligate funds for site rehabilitation against the un obligated balance in the Delaware Underground Petroleum Storage Tank Response Fund account.

9.1.2 Within thirty (30) days of receipt of the Department's written approval of a hydrogeologic investigation work plan, the person conducting eligible activities must provide to the Department

estimates of costs and completion schedules for the hydrogeologic investigation for that site. These estimates must be provided on a form provided by the Department.

9.1.3 Within thirty (30) days of receipt of the Department's written approval of a Remedial Action Work Plan, the person conducting eligible activities must provide to the Department an amended cost and completion schedule estimate which includes costs and schedules for Remedial Action Work Plan as applicable. The cost and completion schedule estimates must be amended for each year Remedial Action task is in progress. These estimates must be provided on a form to be provided by the Department.

9.1.4 The person conducting eligible activities may amend the cleanup cost and completion schedule estimate no more frequently than once per quarter.

10.0 Capital Expense Items

10.1 Reimbursement of Capital Expense Items

10.1.1 Reimbursement of all capital expense items will be prorated based on the normal expected life of the item and the length of time the item was used for purposes eligible for reimbursement, but must not include any shown on previous reimbursement applications.

10.1.2 Reimbursement of all leased capital expense items will be limited to the lease rate multiplied by the length of time the item was used. However, this amount must not exceed the amount calculated using §10.01 of this Part, unless operation, maintenance or other service agreements are included in the cost and are identified in the application.

10.1.3 In the event a capital expense item fails during its normal expected life, the Department will, upon a demonstration that the item has no further useful life, reimburse the remaining unpaid balance of the item minus any salvage value provided such failure was not the result of abuse, misuse, neglect, or improper maintenance. Such payment must be made on the next scheduled reimbursement date.

11.0 Application for Reimbursement

11.1 Submittal of Reimbursement Requests

11.1.1 Upon completion of a Remedial Action Work Plan task, the person conducting eligible activities may apply for reimbursement of allowable costs actually incurred. The application must be made using the forms provided by the Department and must include, where applicable:

11.1.1.1 All records of hydrogeologic investigations and Remedial Action work plans, contracts and contract negotiations, and accounts, invoices, sales tickets, or other payment records from purchases, sales, leases, or other transactions involving costs actually incurred related to site clean up. Such records must be made available upon request to the Department during regular business hours and at other times upon written request of the Department. In addition, the Department may from time to time request submission of such site specific information as it may require. All records of costs actually incurred for Corrective Action shall be certified by affidavit to the Department as being true and correct; and

11.1.1.2 Any records regarding sale of recovered product.

11.1.2 Records relating to site clean up which were generated prior to ~~the effective date of these Regulations~~s January 11, 2008 must, to the greatest extent practicable, be assembled and submitted in accordance with the requirements under this Part.

11.1.3 Copies of any records submitted will be accepted provided the original records are maintained for a period of at least five (5) years from the date of submission of the application and provided these records are made available upon request by the Department.

12.0 Department Review

12.1 Reimbursement Application Review Requirement

12.1.1. The Department will notify the applicant of any apparent errors or omissions in the application, and request any additional information which is required to complete the application.

12.1.2 Additional information may be requested by the Department if an application for reimbursement of the Corrective Action is inconsistent with eligible activities.

12.1.3 The Department's reimbursement application review shall result in approval or denial of the application. However, approval will be limited to those costs for eligible activities which were integral to site clean up and for which reasonable rates were paid.

12.1.4 All costs which do not meet the application approval requirements described under this Part shall be denied.

12.1.5 The Department's written notice will inform the applicant of the reasons for the Department's action.

13.0 Schedule for Reimbursement

13.1 Reimbursement Payment Schedule

13.1.1 Reimbursement for reasonable expenditures will be due and payable within one hundred and eighty (180) days following the date on which the site become eligible for allocation or within one hundred and eighty (180) days following final approval of the reimbursement application, if reimbursement is paid for in stages, whichever is later.

13.1.2 No reimbursement shall be paid to any applicant until the Department's funding obligations for higher priority sites have been met for the year in which reimbursement is due and payable.

12 DE Reg. 1267 (04/01/09) (Prop.)