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# THE UST PIPELINE

News from the Petroleum UST Release Compensation Board

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James R. Rocco, Chairman

Starr J. Richmond, Executive Director

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## Board Reduces Annual Per-Tank Fees



For the second consecutive year, the Board voted to reduce the annual Financial Assurance Fund fee by \$100. For the 2015 program year, the fees will be \$400 per tank for coverage at the standard \$55,000 deductible. Additionally, the per-tank fee for coverage at the reduced \$11,000 deductible will be \$600 per tank. The Board's Finance Committee recommended the reduction in the fee based upon a review of the Fund's unobligated cash balance and the projected revenue and operating expenses over the next five years, including the amount of the estimated unpaid claim liability.

The decrease is effective for the 2015 program year (July 1, 2015 – June 30, 2016). The Certificate of Coverage applications, which were mailed to all owners of record on April 28, 2015, reflect the reduced fee amounts. To prevent a lapse in coverage, annual per-tank fees are due July 1. For more information about Financial Assurance Fund fees, contact the Board's compliance staff at (614) 752-8963 or (800) 224-4659 (in Ohio only).

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## Five-Year Rule Review

Over the past year, the Board's Rules Committee and stakeholders met to review Ohio Administrative Code rules 3737-1-01 through -23. This thorough review is conducted every five years to make sure that the Board's rules are up-to-date and consistent with statutory requirements. As a result of these meetings, the committee proposed a number of amendments that were adopted by the Board and became effective January 1, 2015. The following is a summary of the amended rules:

### **3737-1-03 – Definitions:**

The definition of "fee" was updated to include late payment fees and costs for the collection of delinquent accounts. Tank owners who fail to pay Financial Assurance Fund fees are assessed a late fee of up to \$1,000 per tank. If the fees remain unpaid for more than 90 days, the account is certified to the Ohio Attorney General's Collection Enforcement office for collection and tank owners are charged collection costs on the outstanding debt. This rule change clarifies that the term "fee" includes late payment fees and costs for the collection of delinquent accounts, which are recoverable from the tank owner.

The definition of "unclaimed monies trust account" was also added to the rule. This trust account was established pursuant to Ohio Revised Code 9.39 to hold monies that have been paid to but not claimed by the rightful owner. Rule 3737-1-21 clarifies that the monies in this account are not part of the unobligated balance.

### **3737-1-04 – Annual petroleum underground storage tank financial assurance fee, certification of compliance, and financial responsibility:**

This rule was updated to give the new owner of an underground storage tank (UST) system the option of either paying all fees outstanding at the time of the transfer or conducting a baseline environmental site assessment to establish the concentrations of chemicals of concern existing in the soil and groundwater at the UST site at the time of the transfer. If the new owner pays the outstanding fees and complies with rule 3737-1-04.1 to reinstate coverage with the Fund, a certificate of coverage will be issued effective the date all reinstatement criteria are satisfied. If the new owner elects to complete a baseline environmental site assessment rather than pay the fees outstanding at the time of transfer, a certificate of coverage will be effective upon receipt of the transfer fee and all required documentation. Costs associated with releases discovered before the effective date of a certificate are not eligible for reimbursement.

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## Five-Year Rule Review (cont'd from Page 1)

### **3737-1-04.2 – Baseline environmental site assessment:**

Pursuant to rule 3737-1-04, this new rule sets the minimum requirements for the baseline environmental site assessment to establish the concentrations of chemicals of concern existing in the soil and groundwater at the UST site at the time ownership transfers. The rule was written to be consistent with the Bureau of Underground Storage Tank Regulations' (BUSTR) closure assessment rules. The rule provides that the results of a Phase II Environmental Site Assessment completed within six months of the transfer may be used to complete the environmental site assessment summary report.

### **3737-1-09 – Limitations of fund coverage:**

The rule was amended to clarify that where cost pre-approval was required but not sought or granted, reimbursement is limited to no more than 50% of the usual, customary and reasonable costs of corrective action activities authorized by the fire marshal. Further, costs for performing corrective actions that are not authorized by the fire marshal's rules cannot be reimbursed. Lastly, language regarding non-reimbursable markup costs previously included in rule 3737-1-09.1 and language previously located in rule 3737-1-22 regarding the reduction in the reimbursable amount when the responsible person fails to comply with the Board's subrogation rule were moved to this rule.

### **3737-1-16 – Third-party claims:**

This rule limits the compensation to be paid for third-party claims to reasonable costs of bodily injury or property damage caused by a release. An amendment was added to this rule to clarify that the Board maintains the right to participate or intervene in any pending negotiations, litigation, mediations or settlement discussions with either the responsible person or the third party.

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## Know Your Rights and Responsibilities

As you may know, when a third party, such as a contractor performing work on an underground storage tank (UST) system, causes or contributes to a release of petroleum, tank owners are entitled to seek reimbursement from that third party, or the third party's insurer, for any costs incurred for lost business, bodily injury, property damage, and cleanup of the release.

By law, owners must first work with the third party and, if applicable, the third party's insurer to recoup any losses for lost business, bodily injury, property damage, and cleanup of the release. In addition, tank owners must notify the Board if any insurance coverage exists to cover these activities. A recent case illustrates the importance of knowing if your contractor has insurance coverage as well as the importance of thoroughly reading a contract before signing it.

In December 2011, a tank owner entered into a contract with a contractor to combine separate gasoline and diesel dispensers into a single dispenser at his facility. The contractor hired a subcontractor to install the dispenser; however, the subcontractor improperly hooked up the lines so that customers dispensed gasoline into their diesel tanks. In addition to the crossed fuel lines, the improper installation also caused about 70 gallons of gasoline and diesel to leak into the ground around the dispenser.

Fortunately, the contractor was insured for these types of occurrences. The insurance company began to make payments to the owner for the cleanup of the release as well as to the third parties whose vehicles were damaged as a result of the improper installation of the lines. After paying about \$58,000 for corrective actions, including \$15,000 to third parties who alleged engine damage, it was determined that the contract the tank owner had signed with the contractor had an "exculpatory clause," which limited the contractor's liability, including its insurer's liability, to \$3,300. What this meant for the tank owner is that the contractor's insurer was not responsible for payment of any costs exceeding \$3,300.

The tank owner sued the contractor as well as the insurance company. The suit alleged that the contractor breached the contract by failing to complete the work as indicated in the contract and also alleged that the insurer acted in bad faith by refusing to pay for damages when its insured caused a release of gasoline and diesel. The trial court found that the "limitation of liability" clause contained in the contract which limited the insurer's liability to \$3,300 was valid.

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## Rights and Responsibilities (cont'd)

The tank owner appealed the court's decision; however, the appeals court affirmed the decision that the "limitation of liability" clause was valid. This tale serves as a reminder to tank owners to thoroughly read and understand all contracts prior to signing. An "exculpatory clause" could cost you thousands of dollars that you would otherwise be able to recoup.

**LIMITATION OF LIABILITY CLAUSE: In no event will Contractor's liability to the Client, or to third parties claiming through Client, including without limitation, Client's Insurers, exceed \$3,300.00 regardless of the legal theory upon which a claim may be based, including contract warranty, tort and indemnification, without limiting the generality of the foregoing, this limitation is applicable to loss, destruction, or damage to Client property while in the possession or control of the Contractor. In no event will Contractor be liable to Client or to third parties claiming through Client (including Client insurers) for any incidental or consequential damages whatsoever regardless of the legal theory upon which the claim may be based.**

### Corrective Action:

## Know What You're Paying For!

The Ohio Administrative Code and the Ohio Revised Code set forth rules and statutes for the reimbursement of certain costs from the Financial Assurance Fund (Fund). The Fund reimburses only actual, usual, customary and reasonable costs for corrective actions (CA). Charges that exceed actual and typical costs for performing CA may be denied by the Fund, regardless of what an owner may have agreed to pay, what an owner paid or what an owner was charged for CA work by a consultant.

Some costs charged by a consultant may not, by law, be reimbursable by the Fund. For example, the Fund only reimburses actual mileage at the federal reimbursable rate in effect at the time of travel; fuel surcharges and vehicle rental charges are not reimbursable. Reimbursement of markup costs are limited to 10% and are further limited to services (i.e., laboratory costs, drilling services, utility locating).

If you are responsible for the remediation of a site, keep the following things in mind:

1. The Fund reimburses actual costs that are considered typical based on the Fund's experience. Responsible parties should request unit charge bids rather than lump sum bids and to pay subcontractors directly, if possible, to avoid any markup. While charges for various activities (trucking, landfill, etc.) vary based on location and site, only actual and typical costs can be reimbursed.
2. The Board requires itemized invoices and reimburses only documented charges that are usual, customary and reasonable for performing similar work based on the Fund's experience.
3. Consultants may subcontract other companies for specific task work (i.e. soil excavation, loading, hauling, backfilling or laboratory analyses). It is the owner's responsibility to know what the structure or hierarchy of work will be on the site, what services will be performed by the consultant and subcontractor, what hourly or daily rates will be charged for labor and services, equipment and supply costs, and whether non-reimbursable markup, fuel surcharges or site restoration costs will be charged for those services.
4. For costs that require prior approval from the Fund, the total amount pre-approved for the proposed CA work is also determined by the customary and reasonable costs for performing similar work based on the Fund's experience and the quality of the cost estimate presented in the request. Costs submitted in a claim may be disallowed if they exceed the reasonable cost and/or the amount pre-approved. Costs that are not pre-approved when required, including costs that exceed the amount pre-approved by the lesser of 20% or \$6,000, are subject to reimbursement at no more than 50% of the usual, customary and reasonable costs for the least expensive remedial alternative based on the Fund's experience.
5. A listing of costs that are not eligible for reimbursement can be found on the Board's website at <http://www.petroboard.org/BoardFiles/ineligible.htm>.

If you have any questions regarding the submission or payment of claims, call the Board's claims section at 614-752-8963 or 800-224-4659 (in Ohio only).

## Board Member Update



**John H. Hull, P.E., BCEE**, Vice-Chairman of the Board, was re-appointed to the Board as a representative of the public who is a professional engineer with experience in geology or environmental engineering.

Mr. Hull is currently chairman of Hull & Associates, Inc., a professional environmental engineering consulting firm. Mr. Hull is a registered professional engineer in 14 states and is recognized as a Board Certified Environmental Engineer by the American Academy of Environmental Engineers. Mr. Hull received a Bachelor of Science in Civil Engineering from Ohio Northern University and a Master of Science in Civil Engineering from Stanford University.

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**Stephen L. Hightower** was re-appointed to the Board as a representative of businesses that own underground storage tanks.

Mr. Hightower is currently president and CEO of Hightowers Petroleum Co. In 1984, Mr. Hightower started Hightowers Petroleum Co. as a licensed motor fuel dealer. Mr. Hightower is a "Corporate Round Table Member" of the National Association of Black State Legislators and holds memberships in the Society of Independent Gasoline Marketers Association (SIGMA), National Association of Convenient Stores (NACS), and American Association of Blacks in Energy.

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**Scott J. Fleming** was appointed to the Board in October 2014 as a representative of businesses that own underground storage tanks.

Mr. Fleming is currently an Environmental Compliance Manager for Speedway LLC. Prior to joining Speedway in 2012, he managed two offices in the Midwest for an environmental consulting and engineering firm, where he focused on assisting clients with environmental remediation and compliance needs. Mr. Fleming received a Bachelor of Science in Hydrology-Forest Resources from the University of Minnesota-Twin Cities.

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**Don G. Bryant, Jr.** was appointed to the Board in October 2014 as a representative with experience in property and casualty insurance. Mr. Bryant has been in the insurance industry since 2004, working in the Environmental Practice of Hylant in Cleveland, Ohio. He currently leads the Environmental Risk Management practice where he provides innovative insurance-based solutions to clients seeking to mitigate environmental liabilities.

Mr. Bryant received a bachelor's degree from Kent State. He is a Certified Hazardous Materials Manager and a Licensed Property and Casualty Agent in Ohio.

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## Board Welcomes New Employee

Hannah Brame joined the Board's staff in September 2014 as a Claims Analyst I. In this role, her primary duty is the technical review of claim reimbursement applications, which includes detailed analysis of environmental, technical, and financial data and verification of statutory and regulatory compliance. She is also responsible for administrative duties, including the initial review of incoming claims for completeness and processing settlement determinations and claim payments, as well as providing information to tank owners, consultants and the general public about claims procedures and the documentation required.

Hannah graduated from Ohio University with a Master of Science in Geological Sciences. Her research focused on the effects of invasive species on the ecology of Ordovician seas in the Cincinnati area. She spent a year teaching Introductory Geology and Geology of the National Parks at Columbus State Community College. In recent years, she has worked closely with paleontological museum collections, including the Cincinnati Museum Center and the Karl E. Limper Museum at Miami University, to build an online database and digital atlas of Ohio's invertebrate fossils.