

Cost Pre-Approval Rule Changes (Ohio Administrative Code §3737-1-12.1)

By Rick Trippel, Environmental Claims Analyst

Several changes were recently proposed to the Board's cost pre-approval rule including the addition of mandatory pre-approval of estimated costs to calibrate or disprove the fate and transport model; setting an amount or a floor that estimated costs must exceed before cost pre-approval is required; and providing flexibility in the agency's evaluation process. The changes are anticipated to be adopted at the Board's November 18, 2009 meeting and will become effective on November 30, 2009. A summary of the proposed amendments follows.



Costs to calibrate or disprove the fate and transport model

The submittal of a plan for approval by the fire marshal to calibrate or disprove the fate and transport model is one of the decision options available for Tier 2 evaluations performed under the corrective action rules effective on March 1, 2005. The Board's proposed rule 3737-1-12.1 (A)(4) will require that an application for pre-approval of costs to implement such a plan be submitted simultaneously with the submittal of the plan to the fire marshal when the estimated costs exceed \$6,000. As with other cost pre-approval rules, this new rule protects the financial resources of both the Fund and Ohio's UST owners.

Elimination of some cost pre-approval applications

Amendments to rules 3737-1-12.1 (A)(3) and 3737-1-12.1 (A)(5) eliminate the requirement to submit a cost pre-approval application for a Tier 3 evaluation plan or a monitoring plan proposed in conjunction with a tier evaluation report if the estimated cost to implement the plan does not exceed \$6,000. Although the rule change will likely place more responsibility on tank owners and consultants to evaluate the estimated costs, the proposed rule will eliminate some delays in the corrective action process and allow the Board's staff to focus its efforts on the review of higher dollar value cost pre-approval requests.

Revised estimated cost and completion schedule submittal requirements

Pursuant to proposed rule 3737-1-12.1 (D)(1), when actual implementation of corrective actions for which pre-approval has been granted will exceed the pre-approved costs by 20% or \$6,000, whichever is less, a revised estimated cost and completion schedule must be submitted. Similarly, where initial cost pre-approval was not required because the estimated costs were less than \$6,000, proposed rule 3737-1-12.1 (D)(2) will require a revised estimated cost and completion schedule to be submitted if, upon implementation, it is determined the actual costs will exceed \$6,000.

Rule 3737-1-12.1 (D) will require revised estimated cost and completion schedules to be submitted on a prescribed form. In instances where initial cost pre-approval was not required, the form will require the inclusion of costs for the implementation of all associated corrective action work from start to finish, not just the work and associated costs that exceed \$6,000. For example, the revised estimated costs should include all incurred and future estimated costs associated with a plan to calibrate or disprove the Tier 2 fate and transport model. The prescribed form will ensure sufficient information is submitted with a revised estimated cost and completion schedule to allow a timely review by the Board's staff and provide UST owners and their consultants with a better assessment of the pre-approved costs.

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Where a revised estimated cost and completion schedule is submitted for pre-approval, the Fund's director may take one of two actions according to proposed rule 3737-1-12.1 (E). Similar to the current practice, the estimated costs may be evaluated for what is usual, customary, and reasonable based on the Fund's experience before the work is initiated. As an alternative, the Fund's director may forego an immediate evaluation by providing notification to the owner that the costs will be evaluated when the application for reimbursement is received by the Board. In either event, the costs will not be subject to a reduction in reimbursement due to the failure to seek cost pre-approval when required.

Cost Breakdowns

Where an estimated cost and completion schedule is submitted to the Board for pre-approval, proposed rule 3737-1-12.1 (F) mandates that the estimated costs be detailed on a time and material basis. The Board's staff is better able to evaluate the estimated costs relative to the proposed work when costs are provided on a time and material basis. In addition, responsible persons and their consultants are provided with a more complete evaluation of the pre-approval request.

Summary

Overall, the proposed amendments will be beneficial to both the Fund and Ohio's UST owners. The Fund benefits by expanding the means of protecting Fund dollars while allowing the Fund's director more discretion to determine the amount of staff time and resources to expend for some required pre-approvals. Owners and their consultants benefit through the ability to forego seeking cost pre-approval for certain corrective action activities where the initial or additional estimated costs are limited.

Unless explicitly exempted by one of the rule changes described above, the Board will continue to require cost pre-approval for:

- Interim Response Actions where prior approval of the fire marshal must be obtained;
- Remedial Action Plans (RAP);
- Tier 3 evaluation plans;
- Monitoring plans when proposed in conjunction with a tier evaluation report;
- Free product removal (FPR) where recovery has been in place for one year; and
- Annual RAP and FPR activities.

As in the past, where cost pre-approval is not required by the Board's rules, owners may continue to voluntarily seek pre-approval of corrective action costs in order to judge the maximum reimbursable amount. Calculation of the maximum reimbursable amount is based on the usual, customary, and reasonable cost of performing similar corrective action as determined through the Fund's experience.

Reimbursement of costs for which pre-approval was required but was not sought by the owner will be limited to no greater than 50% of the usual, customary, and reasonable cost for the least expensive remedial alternative based on the Fund's experience. If you have any questions regarding cost pre-approvals or other issues pertaining to corrective action cost reimbursement, please call the Board's office at 614-752-8963 or 800-224-4659 (Ohio only).